



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 29 OF 2017

(FORMERLY MERU ELC NO 221 OF 2012)

PATRICK NDIRANGU KIMANI.....PLAINTIFF/APPLICANT

VERSUS

MILKA WAMBUI KIMANI.....DEFENDANT/RESPONDENT

RULING

1. On the 3rd April, 2017 the Court dismissed the Plaintiff's suit pursuant to the provisions of Order 17 Rule 2 for want of prosecution but reinstated it on the 13th June 2017 following a successful application to have it re-instated.
2. Pursuant to the said re-instatement and directions for parties to comply with the provisions of Order 11 of the Civil Procedure Rules so that the suit could be heard, the Plaintiff herein filed an application dated the 20th September 2017 seeking for leave to amend his plaint. The Court directed that the application be served upon the Defendant who then filed his Replying Affidavit and a Preliminary Objection dated the 17th November 2017.
3. The Court having considered the application on the Preliminary Objection which sought to dispose of the entire application, directed that the same be disposed of in the first instance by way of written submissions. The Court also sought that the Nyeri HCC No 106 of 2008 (OS), which was the subject matter of the Preliminary Objection, be availed.
4. Parties filed their respective written submissions and highlighted on the Preliminary Objection wherein Counsel for the Plaintiff /Applicant submitted that they had filed the application dated 20th September 2017 seeking leave to amend the plaint in terms of their draft amended plaint which they had annexed, wherein they sought to enjoin parties necessary to the suit in particular the District Land Registrar who would be affected by any orders to be issued in this matter.
5. That secondly, there had been inadequacy in their drafting in regard to the capacity of the proposed Plaintiff as well as matters of proof of fraud that had not been properly addressed in the former/original plaint. That they sought nothing more than to make a clear and conscience case for the Plaintiff.
6. That the only issue that had been raised in the Preliminary Objection was the issue as to whether the Plaintiff had been acting as a guardian Ad Litem or an Administrator Ad litem.
7. That pursuant to a supplementary affidavit filed on 29th November 2017, they had clarified the capacity of the Plaintiff who was properly before Court to sue on behalf of the deceased's estate.
8. Their submission was that the matters raised by the Replying Affidavit were matters that went to the core of their suit namely whether the Plaintiff should represent the deceased and also whether the present suit was competent in view of a Nyeri High Court Case No 106 of 2008 (OS).
9. That the presence of Case No 106 of 2008 being a bar to institute the present case was not a subject of res judicata. That they had not sought to introduce a new cause of action from the one originally filed and neither had they introduced new prayers for which the Preliminary Objection ought to be dismissed and their application to amend their Plaint be allowed with costs.
10. The Defendant's highlighted submission on the other hand was that they had opposed the Application to amend the Plaint by filing a Preliminary Objection and a Replying Affidavit sworn on 17th November 2017 and filed on 20th November 2017.

11. That on the issue of the capacity to sue, on the first attempt to file the application, the Plaintiff had claimed to be a guardian ad litem wherein the Defendant had pointed out that it had been a misrepresentation of the law wherein they had clarified that they were coming to Court as Administrators Ad Litem. That in as far as they were concerned, that could pass, but there were serious issues to be decided for example:

i) That the subject matter of the suit being Ref No Nyandarua/Ndaragwa/444 had been transferred to the Defendant by the deceased way before he passed away. To this effect that same could not form part of his estate and it was therefore erroneous for the Plaintiff to purport to sue on behalf of the deceased on a property that did not form part of his estate

ii) That long before the deceased, who was the Plaintiff's father and husband to the Defendant, had passed away, the Plaintiff had engaged him in a number of suits litigating on the same subject matter as the present suit. That after the deceased had transferred the suit property to the Defendant, the Plaintiff had sued both of them via Nyeri High Court Case No 106 of 2008 (OS) wherein the deceased had filed his defence. That after his death, the Plaintiff had withdrawn the said suit and had filed the present suit which was over the same subject matter.

12. It was the Defendant's submission that in an attempt to abuse the Court process, the Plaintiff was now telling the Court, that:

"yes, I sued the deceased who defended himself, now I want to put on the deceased's shoes and represent his interest"

13. That the Plaintiff who litigated against the deceased could not now purport to represent the deceased because their interests were very different. That for the Plaintiff to seek to litigate for the deceased whom he had sued previously was an abuse of the process and therefore the purported amendment to the Plaint should not be allowed because it would change the whole substratum of the suit.

14. That the provisions of Order 2 rule 6(1) of the Civil Procedure Rule were clear to the effect that:-

"No party may in any pleadings make an allegation of fact or raise any ground of claim, inconsistency with the previous pleading of his in the same suit."

15. That what the Plaintiff sought was inconsistent with the suit. The Defendants relied on the decided case in **Tulip Properties Ltd vs Mohammed Korir & 6 Others** and in the case in **Andrew Wabuyele Bikati vs Chinese Centre for the Promotion of Investment and Trade in Kenya Ltd & 2 Others (2015) eKLR** where the Court had held that it had discretion to order amendment at any stage before judgment and that the amendment should be freely allowed provided that it was neither done mala fide nor to occasion prejudice or injustice to the other party in a way which could not be compensated by an award of costs.

16. That the previous litigation by the Plaintiff in this application was brought mala fide and would occasion injustice to the widow of the deceased.

17. The Defendant's further submitted that Counsel for the Plaintiff had sworn the affidavit in support of the application and had therefore stepped into the arena which was incurably defective. That if they were to cross examine the deponent, where would he stand? They sought for the Plaintiff's application to be dismissed with costs.

18. In rejoinder, Counsel for the Plaintiff submitted that no grounds of inconsistencies between the proposed amended plaint and the original plaint had been raised. That no new prayers had been introduced and the fate of the suit could not be determined at a preliminary stage and therefore they ought to be permitted to ventilate their issues

19. That according to the Defendant's submission the Preliminary Objection was no longer a matter of res judicata but an issue of abuse of Court process and the most suitable way to decide these issues was therefore to have the matter heard and determined for the Court to dismiss or uphold the same.

20. That the issue to wit that the Plaintiff was acting against the interest of the deceased did not fall into consideration at this stage where the matter involved property to which issues of fraud have been raised and the Plaintiff therefore sought for a declaration of trust. That the issues raised were pertinent issues to which the Court ought to hear and decide on them.

21. The Plaintiff reiterated that the main application was not incurably defective because Counsel were allowed to be deponents in matters in which they represent their clients where they could seek to amend the plaint because those issues were technical and within the appreciation of Counsel and not litigants. They sought that the Court disallows that argument.

Determination.

22. Having considered the submissions herein submitted, the and authorities cited thereof, I find the matter for determination as being:

i. Whether the Preliminary Objection raised is sustainable.

ii. Whether the present suit is Res Judicata or sub-judice Nyeri High Court Case No 106 of 2008 (OS).

23. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“So far as I am aware, a Preliminary Objection 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. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

24. In **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.”

25. From the above holding, it is clear that Preliminary Objection must therefore be raised on the assumption that all facts pleaded by the adverse party are correct. It should not raise substantive issues from the pleadings which must be determined by Court upon perusal of evidence. To this effect a Preliminary Objection should be raised on a point of law not on facts, which are yet to be ascertained. A point of law is therefore derived from statute. This means that a party cannot raise it claiming to question the truthfulness of a fact in a case. A Preliminary Objection raised on such grounds is from the face of it a breach of rules of procedure and amount to abuse of Court process.

26. The Defendant herein in opposing the Plaintiff’s application to amend his plaint sought that the said Application be dismissed with costs on a point of Preliminary Objection to the effect that the Plaintiff lacked capacity to institute and sustain the suit as a guardian ad litem of the deceased person’s estate, because the subject matter of the suit being Ref No Nyandarua/Ndaragwa/444 had been transferred to the Defendant by the deceased way before he passed away and secondly that the suit property was not part of the estate of the deceased Gilbert Guandaru Kimani. The Defendant also raised a Preliminary Objection to the effect that the present suit was res judicata Nyeri HCC No. 106 of 2008(OS) and therefore an abuse of the Court process.

27. The Plaintiff has opposed the said issues raised herein by the Defendant opining that they went to the core of the Plaintiff’s suit namely whether the Plaintiff should represent the deceased which were basically facts that could not be determined at a preliminary level. The Plaintiff has further refuted that the present suit was res judicata Nyeri High Court Case No 106 of 2008 (OS).

28. Having considered the submission for and against the Notice of Preliminary Objection and further considering that a Preliminary Objection should be raised on a point of law and not on facts which were yet to be ascertained, I find that the first two points of objection raised by the Defendant/Respondent were indeed facts which could only be determined after a full hearing. To this extent the Preliminary Objection fails.

29. As to the issue on the present suit being Res judicata Nyeri High Court Case No 106 of 2008 (OS), I called for and perused the impugned file herein. I find that on the 29th October 2009 before the matter, where the present Plaintiff had sued two defendants, could be heard, the Court had been informed that the 1st Defendant in that matter, the deceased herein, had passed away. His Counsel had thus sought to substitute him wherein the matter had been stood over to a date that was to be taken in the registry once the substitution was done. That was the last proceedings recorded by the Court.

30. However before any substitution could be effected, and while the matter was still subsisting as against the 2nd Defendant, the Plaintiff, via an application dated the 19th July 2010, filed a Notice to withdraw the suit which Application was neither prosecuted nor allowed by the Court and as such, both the Application for substitution and the Application to withdraw the suit still remain in abeyance. That being the case and irrespective of the state of affairs, the Plaintiff filed the present suit on the 12th December 2012.

31. A further closer look at Nyeri High Court Case No 106 of 2008 (OS), I find that the matter was between Patrick Ndirangu Kimani vs Gilbert Kimani Guandaru and Milka Wambui Kimani where the subject matter was parcel LR Nyandarua /Ndaragwa/438-444 which were sub-divisions of parcel of land No. LR Nyandarua /Ndaragwa/227.

32. At paragraph 17 of the present plaint, the Plaintiff had deponed that there had been no other suit between the parties over the same cause of action before.

33. A look at the parties in the present suit, the same are depicted as Patrick Ndirangu Kimani vs Milka Wambui Kimani wherein the subject suit is LR Nyandarua /Ndaragwa/444.

34. I find that *the matter in issue in the present suit is directly and substantially in issue in the previously instituted suit pending being Nyeri High Court Case No 106 of 2008 (OS) and between the same parties and therefore the present suit is not Res judicata as submitted by the Defendants, but offends the provisions of Section 6 of the Civil Procedure Act which provides as follows:*

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

35. I find that where the test of res sub judice is established or met, the marginal notes in Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined. There can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which require under Section 1B that there be an *“efficient use of the available judicial and administrative resources”*.

36. Having considered all the above, I am satisfied that the present matter being sub-judice Nyeri High Court Case No 106 of 2008 (OS), the remedy is not to strike it out but to direct as follows:

- i. That this suit shall remain stayed pending the determination of Nyeri High Court Case No 106 of 2008 (OS)
- ii. The Plaintiff will meet the costs of this application.

It is herein ordered

Dated and delivered at Nyahururu this 14th day of July 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE