



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 262 OF 2018

KENNEDY ELLAM WEKESA (As the representative of Estate of GEORGE ELLAM WEKESA....PLAINTIFF

-Vs-

ABDULLA TAIB (As the representative of Estate of SHEIHK ALI TAIB.....DEFENDANT

RULING

1. This ruling is in respect of the preliminary objection dated 20th March, 2019 by the defendant seeking to have the suit dismissed in its entirety for the reasons that the court lacks jurisdiction to hear and determine this suit for the following reasons:

- a. This suit contravenes civil procedure rules order 24 rule 10 as judgment had been entered in favour of the defendant on 15th of November 2003 in Mombasa HCCC No.260 of 2003 Sheikh Ali Taib –v- George Ellam Wekesa yet George Ellam Wekesa died on the 26th of July 2006;
- b. This court cannot interpret, set aside or order the revision of the judgment of the court of appeal of Kenya.
- c. This suit is res judicata as the issues raised herein had been raised before the Court of Appeal in Civil Appeal No. 146 of 2001 Kennedy Ellam Wekesa and Sheikh Ali Taib, George Ellam Wekesa, Selina Wekesa;
- d. This suit is res judicata as judgment has been entered in favour of the defendant on the 15th of November, 2003 and 6th of December, 2018 in Mombasa HCCC No. 260 of 2003 Sheikh Ali Taib –v- George Ellam Wekesa and HCCC 454 of 202(OS) Selina Wekesa Vs. George Ellam Wekesa & Sheikh Ali Taib respectively.
- e. This court cannot issue a permanent injunction and/or review and or sit on appeal against the decision and judgments of other High Court Judges in Mombasa HCCC No. 260 of 2003 Sheikh Ali Taib vs George Ellam Wekesa and HCCC No. 454 of 2002 (OS) Selina Wekesa Vs. George Ellam Wekesa & Sheikh Ali Taib and Judges in the Court of Appeal in Civil Appeal No. 146 of 2011 Kennedy Ellam Wekesa and Sheikh Ali Taib, George Ellam Wekesa, Selina Wekesa.

2. It was submitted by counsel for the defendant that the same parties to this suit have litigated in respect of the same subject matter of this suit in 4 different cases, 2 in the High Court and 2 in the Court of Appeal. Those cases are **HCCC No. 454 of 2002 (OS) Selina Wekesa –v- George Ellam Wekesa and Sheikh Ali Taib**, which resulted in **Court of Appeal No. 57 of 2015 Sheikh Ali Taib –v- George Ellam Wekesa & Selina Wekesa**, **HCC NO. 260 for 2003 Sheikh Ali Taib –v- George Ellam Wekesa** which resulted in **Court of Appeal Civil Appeal No. 146 of 2011 Kennedy Ellam Wekesa –v- Sheikh Ali Taib, George Ellam Wekesa & Selina Wekesa**. The current case is the 5th suit by the same parties over the same subject matter. It is therefore the defendant’s submission that the suit is res judicata. The defendant’s counsel further submitted that this court does not have jurisdiction to interpret, set aside or revise the judgment of the Court of Appeal and even decisions of other court with the same jurisdiction. The defendant’s counsel added that this court cannot sit on appeal over a judgment even of its own court or similar court. The defendant’s counsel relied on the case of **Mukisa Biscuit Manufacturing Company Limited –v-West End Distributors Limited (1969) E.A 696; Pop in Kenya Limited –v- Habib Bank A. G. Zurich C. A. No. 80 of 1988; Henderson –v- Henderson (1843) 3 Hare 100 to 105.**

3. Counsel for the defendant submitted that nothing stops the defendant from executing against the plaintiff and cited Order 24 Rule 10 and relied on the case of **Mueni Kiamba –v- Mbithi Kimeu Kimolo (2017) eKLR and Fidelity Commercial Bank Ltd –v- Green Woods Ltd & 2 Others – NBI HCCC No. 219 of 2013**. The defendant’s submission is that the court is functus officio and relied on the case of **Peterson Ndungu –v- Kenya Power & Lighting Company Ltd (2018) eKLR** and also the ruling of the Court of Appeal in Civil Appeal 57 of 2015 **Sheikh Ali Taib –v- George Ellam Wekesa & Another** where the Court of Appeal stated:

“the litigation leading to this appeal is riddled with unbridled and undisguised abuse process as found by Ibrahim J. in a ruling dated 11th May 2011 and by this court in a judgment dated 25th of July 2013 in Civil Appeal No. 146 of 2011. In particular it is a classic example of abuse of the device of ex-parte applications, which courts of law should not countenance or condone.”

4. On their part, counsel for the plaintiff submitted that he could not file an application in HCCC NO. 260 of 2003 because the same has abated and that likewise the defendant cannot execute a decree in that suit as the suit no longer exists. The plaintiff's submissions is that the suit is not res judicata, adding that the issues raised can only be raised in a formal application by way of Notice of Motion. The plaintiff's counsel urged the court to ignore the defendant's submissions in its entirety because it is introducing contested facts by way of exhibits in submissions, which, it is submitted, is unprocedural. The plaintiff urged the court to dismiss the defendant's preliminary objection with costs.

5. I have considered the pleadings and the submissions made. The main issues in the preliminary objection raised are whether the court has jurisdiction to try the matter and whether the suit is res judicata.

6. In the celebrated case of **Mukisa Biscuit Manufacturing Company Ltd –v- West End Distributors Ltd (supra)**, it was stated:

“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 discretion.”

7. I have perused the plaint and the Notice of Motion herein, both dated 7th November, 2018. In the said pleadings, the plaintiff has extensively made reference to various decided cases, both in the High Court and in the Court of Appeal. Indeed the plaintiff has annexed the pleadings in Mombasa HCCC NO. 454 of 2002 (OS) as well as Judgment of the Court of Appeal in Civil Appeal No. 146 of 2011, **Kennedy ELlam Wekesa –v- Sheikh Ali Taib & 2 Others**. In the Plaint, the plaintiff is praying for judgment against the defendant for: -

a. A declaration that unless the judgment in Civil Appeal No. 146 of 2011 in the Court of Appeal is revised or set aside with respect to its holding that HCCC NO. 260 of 2003 has abated the suit remains dead and no execution proceedings can go on unless the judgment of the Court of Appeal in Civil Appeal No. 146 of 2011 is revised or set aside with respect to its holding that HCCC No. 260 of 2003, has abated, HCCC No. 260 of 2011 remains dead and no execution proceedings can ensue therefrom.

b. A declaration that the intended execution of the Decree in HCCC NO. 260 of 2003 is unprocedural illegal and nullity ab initio.

c. Permanent injunction restraining the defendant from in any way interfering with the plaintiff's possessory interest in all that property known as Mombasa Block X/97 and in particular the quiet enjoyment of the possession thereon.

d. Costs of this suit.

8. In this case, the preliminary objection has been raised by the defendant. Therefore it could only be argued on the assumption that all the facts pleaded by the plaintiff are correct. One such pleading is that there were previous suit both in the High Court and the Court of Appeal. It is clear from the plaint that the plaintiff is challenging the execution in HCCC No. 260 of 2003.

9. 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 No. 19 of 2011. This court's jurisdiction is highlighted in Section 13 of Act No. 19 of 2011 which states that “the court shall 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.”

10. This court being in equal status to the High Court is subject to the provisions of Article 165 (6) of the Constitution which states thus:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.”

11. The question that arises therefore is whether a judge sitting in the Environment and Land Court has jurisdiction to hear and determine a dispute over a decision, order or issue arising that has already been decided before the High Court and also the Court of Appeal. In other words, can this court entertain a cause of action which emanates from the decision of the Court of Appeal and even the High Court?

12. It is clear from the pleadings herein that the plaintiff wants this court to entertain a cause of action which emanates from the Court of Appeal in Civil Appeal No. 146 of 2011.

13. I have carefully considered the submissions rendered in support and against the preliminary objection herein. I have also considered the provisions of the constitution and the relevant legislation governing the jurisdiction of this court as well as precedence and come to the conclusion that I do not have jurisdiction to entertain the suit for the following reasons. First, by virtue of the provisions of Article 165 (6) of the Constitution, I do not have the mandate to interpret and make declarations over judgments or decrees of another superior court as that will amount to supervising a judge whether sitting in the High Court or Court of Appeal. To hear and determine the suit as filed is equivalent

to supervising the judges of the Court of Appeal and the High Court, and even of this very court.

14. The Supreme Court in the case of **Republic –v- Karisa Chengo & 2 Others (2017) eKLR** stated inter alia:

“to our minds, by using the words ‘with the status of the High Court’ it is clear than the High Court is not higher in hierarchy that the ELRC and ELC; these are courts of equal rank. By being of equal status, the High Court therefore does not have the jurisdiction to superident, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies.”

15. The Court of Appeal in the case of **Bellavue Development Company Ltd –v – Francis Gikonyo & 7 Other (2018) eKLR** it page 5 stated thus:

“This position is so well established that it would be strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncement of judges of the same status as himself , a task that is left to courts and judges of higher status in hierarchy by way of appeals. ”

16. Taking into account the constitutional provisions cited, the submissions rendered and the decisions cited above which decisions are binding on me, it is my finding that I have no powers to entertain the matter herein as doing so will amount to my reviewing an order and supervising the decisions of the court of equal status and a higher court and therefore it is my finding that the court has no jurisdiction in this matter. The preliminary objection raised by the defendant is merited. Accordingly, the same is upheld with the result that the suit herein and the application dated 7th November 2018 are struck out for want of jurisdiction with costs to the defendant.

DATED, SIGNED and DELIVERED at MOMBASA this 9TH day of July 2020.

C.K YANO

JUDGE

IN THE PRESENCE OF:

Yumna

Court

Assistant