



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 608 OF 2012

[FORMERLY ELDORET HCCC NO. 46 OF 2010]

ALICE JEPKOECH YANO AND 2 OTHERS.....PLAINTIFFS

VERSUS

SAMSON KIPROP AND 6 OTHERS.....DEFENDANTS

AND

SALIM SEIF AMBUNYA ANDANJE &

22 OTHERS.....PROPOSED INTERESTED PARTY

RULING

[NOTICE OF PRELIMINARY OBJECTION DATED 16TH JULY, 2019 TO THE PROPOSED INTERESTED PARTIES' MOTIONS DATED 4TH JULY, 2019]

1. The Proposed Interested Parties filed two Motions dated 4th July, 2020. The first Motion seeks for **Salim Seif A. Andanje and 22 Others** to be made parties in this suit, as the 1st to 22nd Interested Parties, previous proceedings and orders be set aside in order for them to participate in the proceedings. The second application seeks for review/setting aside of the orders delivered on the 5th March, 2015 pending the hearing and determination of the suit. That each of the applications is supported by the affidavit sworn by **Salim Seif A. Andanje** on the 4th July, 2019 summarized as follows;

(a) That the deponent has the authority of the other 21 Proposed Interested Parties to swear the affidavits.

(b) That in the judgment of 5th March 2015, the Defendant was ordered to vacate from the suit land. That the Proposed Interested Parties were the ones in occupation of the said land and had not been enjoined in the suit. That they filed an application for stay dated 9th May, 2016 but were evicted. That they filed **Constitutional Petition No. 8 of 2017**, which was dismissed on the 21st February, 2019.

(c) That upon seeking legal advice from their Advocates, they filed the two applications as they were condemned unheard.

2. The Plaintiff appear to have responded to only the second application for review/setting aside the order of 5th March, 2019 vide the Replying affidavit sworn by **Alice Jepkoech Yano** on the 16th July, 2019 summarized as follows;

(a) That the application is baseless, res-judicata and should be dismissed with costs.

(b) That the court is functus officio in view of the decision in the subsequent Constitutional Petition by the Proposed Interested Parties challenging the order of 5th March, 2015 that was dismissed, and a similar Motion dated 10th May, 2016 that has not been prosecuted.

(c) That the Proposed Interested Parties have inordinately delayed in filing this application as the judgment of 5th March, 2015 has since been executed.

(d) That the Proposed Interested Parties are forum shopping, and litigation must come to an end as the continued proceedings is putting the Plaintiff to suffer injustice.

3. The Plaintiff also filed the Notice of Preliminary Objection dated the 16th July, 2019 to the Proposed Interested Parties' application dated 4th July, 2019 raising the following grounds;

(a) *That the application is res-judicata and the court is now functus officio.*

(b) *That the application offends the rules governing the procedure and practice and hence an abuse of court process.*

(c) *That counsel, M/s Christopher Mitei c/o Arap Mitei & Company Advocates, is not properly and or at all on record for the Proposed Interested Parties.*

(d) *The Proposed Interested Parties' application is scandalous, "curably defective", contravened the provisions of the law, is incapable of being granted, and should be dismissed with costs.*

4. That following the directions of 7th November, 2019, the learned counsel for the Plaintiff and Proposed Interested Parties filed their written submissions dated 7th January, 2020 and 20th May, 2020 respectively.

A. PLAINTIFF'S SUBMISSIONS

The learned Counsel submits that following the Proposed Interested Parties' Motion dated 4th July, 2019, seeking among others the review/setting aside of orders of 5th March, 2015, the Plaintiff filed their replying affidavit sworn on 16th July, 2019 and the notice of preliminary objection of even date. The learned Counsel summarized the grounds in the preliminary objection as res-judicata, review, abuse of court process and functus officio. The Counsel submits that the Interested Parties' application is res-judicata, and the court is now functus officio. The Counsel referred to **Section 7 of the Civil Procedure Act chapter 21 of Laws of Kenya**, and the case of ***Henderson Vs Henderson (1843-60) All ER.378***. It is their submissions that after the Court's rendered its judgment on 5th March, 2015 the "**Defendants/Proposed Interested Party**" filed constitutional Petition that sought to declare the judgment of 5th March, 2015 a nullity. That the Constitutional Petition was however dismissed. That the Proposed Interested Party then filed an application dated 10th May, 2016 for similar prayers as the current one, but was also dismissed after interpartes hearing. That the Proposed Interested parties' application is therefore a clear breach of rules, the laws and precedents governing the doctrine of res-judicata. The learned Counsel referred to the case of ***Lotter Vs Tanaki [2003] 2 E.A. 556*** on the principles guiding the court on determining whether a subsequent suit is res-judicata. That further, the Proposed Interested Parties have not satisfied the grounds set in **Order 45, Rule 1 of Civil Procedure Rules** for review of the order to be considered, as they have not exhibited the new and important matter discovered, or shown any mistake or error apparent on the face of the record or other sufficient reason to base the application on. That the application has been filed after about five years from 5th March 2015, when the order was made, and there has been inordinate delay. It is also the submissions of the learned Counsel that the Proposed Interested Parties application is an abuse of the Court process, lacks merit, and causes unnecessary expenses on the Plaintiffs who have already had the judgment executed. That the application is in contravention of **Order 2 Rule 15(1)(b) and (d) of Civil Procedure Rules**. The learned Counsel referred to the Court of Appeal decision in ***Trust Bank Ltd Vs Amin Company Ltd & Another (2000) KLR 164***. The Counsel referred to **Section 1A** which deals with overriding objective, **3A** which reiterates the court's inherent powers, and **Section 63(e) of Civil Procedure Act**, and submitted that as the Court has already substantively dealt with the issue raised, and delivered its judgment on 5th March, 2015, there are no legal provisions left to allow the Court to hear the Proposed Interested Parties' application. That the application should therefore be dismissed as it contravenes the doctrine of res-judicata.

B. PROPOSED INTERESTED PARTIES' SUBMISSIONS

The learned Counsel for the Proposed Interested Parties submits that his clients filed the Motion dated 4th July, 2019 because they were aggrieved by the judgment of 5th March, 2015 that resulted to their being evicted from the suit land hence making them homeless while they were not parties in the suit. That the preliminary objection raised by the Plaintiff is not properly before the court, has no merit, and does not meet the required threshold. That as to decide on whether the application is res-judicata would require the parties to avail pleadings of those other suit, and application which can only be done through affidavits, then it ceases to be a preliminary objection, and should be struck out with costs. The learned Counsel referred to the case of ***Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd*** on what constitutes a preliminary objection. The Counsel further submits that the court is not functus officio, and has power under **Order 45 Rule 1 of Civil Procedure Rules** to review its judgment/decreed/order upon sufficient reason been presented. That as the Proposed Interested Parties only came to know of this suit when they were evicted and made homeless, the orders of 5th March, 2015 should be reviewed and set aside. That the preliminary objection is unwarranted and should be dismissed with costs.

5. The following are the issues for the court's determinations;

(a) *Whether the issues raised in the Proposed Interested Parties' applications have already been determined as between the same parties, and over the same subject matter by a court of competent jurisdiction.*

(b) *Whether this court is functus officio.*

(c) *Who pays the costs on the preliminary objection?*

6. The Court has carefully considered the grounds on the preliminary objection, the written submissions by Counsel, the superior court's decisions cited and come to the following determinations;

(a) That as submitted by the learned Counsel for the Proposed Interested Parties, a preliminary objection should raise a pure point of

law which is argued on the assumption that the facts pleaded are correct. That a preliminary objection cannot be raised where some facts need to be ascertained or where it seeks the discretion of the court. **[See Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd]**. That the first ground in the notice of preliminary objection is that the application is res-judicata, and that the court is functus officio. The issue of subsequent suit or application being res-judicata or a contravention of **Section 7 of the Civil Procedure Act** is definitely a question or issue of the law. That the issue of the Court being functus officio goes to the jurisdiction of the Court in a matter before it, and therefore is equally an issue or question of the law.

(b) That the basis of the Plaintiffs raising the issue of res-judicata and functus officio is the fact that the Court made its determination on 5th March, 2015 and that the subsequent attempts by the Proposed Interested Parties to challenge that decision through previous application in this suit, and the Constitutional Petition in which they sought to have the order of 5th March, 2014 declared a nullity has also failed. That accordingly, what the Proposed Interested Parties are seeking through their pending applications dated 4th July, 2019 has already been decided upon and therefore the applications are res-judicata and the court functus officio.

(c) That the Proposed Interested Parties' response to the preliminary objection is that, for the court to make a determination on the existence of the application, and Constitutional Petition that they have been alleged to have filed and lost, there would be need to provide evidence through affidavits. That in that case, the preliminary objection that is required to be decided without calling evidence will stop being one, and become liable to be dismissed with costs.

(d) That the Court having considered the preliminary objection, the written submissions by the two learned Counsel, and upon perusing the record, it becomes apparent that the Proposed Interested Parties have not challenged or rebutted the Plaintiffs' position that they had participated in this suit through some applications including one for stay of execution that they lost. That the Proposed Interested Parties have also not denied that they filed Constitutional Petition No. 8 of 2017 that sought that the proceedings in this suit be declared a nullity for failure to enjoin them as squatters on the suit land, but lost it. That there is no rebuttal or challenge by the Proposed Interested Parties that the parties and subject matter to the applications, and the said Constitutional Petition were the same as in this suit. That the foregoing facts do not require any filing of affidavits to annex pleadings as alleged by the learned Counsel for the Proposed Interested Parties, as they are not disputed.

(e) That the finding in (c) above leads the court to agree with the submissions of the learned Counsel for the Plaintiffs that indeed, the issues the Proposed Interested Parties seeks to have determined through their applications have already been determined through the previous application that have been decided, and the Constitutional Petition as between the parties, and over the subject matter. The Proposed Interested Parties applications dated the 4th July, 2019 are therefore res-judicata, and thus the court is functus officio. That if the Proposed Interested Parties were aggrieved by this Court's decision in the stay application and Constitutional Petition, their recourse should be on appeal.

(f) That the Plaintiffs appear to have abandoned the ground of Mr. Christopher Mitei c/o M/s Arap Mitei & Company Advocates, being improperly on record as it was not raised in the learned Counsel's submissions. That the Court will therefore leave it at that.

(g) That as the Plaintiffs have succeeded in the preliminary objection, the Proposed Interested Parties will pay their costs in the application and preliminary objection.

7. That flowing from the foregoing, the Court finds merit in the Plaintiffs' preliminary objection which is hereby upheld and the following orders issued;

(a) That the issues raised in the Proposed Interested Parties' applications by way of Notice of Motion dated the 4th July, 2019 are res-judicata, and a contravention of **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, in view of the already decided matters including the stay application, and Constitutional Petition No. 8 of 2017 that were between the same parties, and over the same subject matter. That the preliminary objection is hereby upheld and the Proposed Interested Parties' applications dated 4th July, 2019 struck out with costs to the Plaintiffs.

(b) The Proposed Interested Parties to also pay the Plaintiffs' costs in the preliminary objection.

Orders accordingly.

Delivered virtually and dated at Eldoret this 18th day of November, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiffs: Absent.

Defendants: Absent.

Proposed Interested Parties: Absent.

Counsel: Absent.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.