



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CASE NO. 08 OF 2020**

**MAJANI ESTATES LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**MUTHONI NKONGE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MURIUKI NDUBI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SAULU NDIGA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**KARIBA KANAMPIU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**MWIRIGI MIRITI.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**MUGENDI KAINYATI.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**PAUL KINYUA RIUNGU.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**MWITI RIUNGU.....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**BENEDICTINE NJIRU RIUNGU.....9<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling concerns a Notice of Preliminary Objection dated **8<sup>th</sup> September, 2020** filed by the defendants which reads as follows:

**NOTICE OF PRELIMINARY OBJECTION**

**TAKE NOTICE** that the defendants/respondents herein shall raise a preliminary objection on points of law against the plaintiff/applicant's suit and urge this honourable court to strike it out on the ground that;

1. That this suit offends the clear provisions of section 6 of the Civil Procedure Act Cap 1 laws of Kenya as the matter in issue is also directly and substantially in issue in High Court Succession Cause No. 246 of 1995 at Meru which issued an order of status quo on 30<sup>th</sup> July, 2020 against Land Parcels LR No. Mwimbi/Chogoria/5951, LR No. Mwimbi/Chogoria/5952 and LR No. Mwimbi/Chogoria/5953 and which matter comes up for inter parties hearing on 30<sup>th</sup> September, 2020.

**Dated at Chuka this 18<sup>th</sup> day of September, 2020**

2. The Preliminary Objection (PO) was canvassed by way of written submissions.

3. The proponent's written submissions state as follows:

**DEFENDANTS/RESPONDENTS SUBMISSIONS IN SUPPORT OF THE NOTICE OF PRELIMINARY OBJECTION DATED  
18<sup>TH</sup> SEPTEMBER 2020**

May it please you my Lord,

The defendants/respondents have filed before this honourable court a Notice of Preliminary objection dated 20/09/2020 and a replying affidavit dated the same date.

They have referred to an order issued in High Court of Kenya Succession Cause No.246 of 1995 where conservatory orders were issued on the 30<sup>th</sup> day of July 2020. The gist of the Notice of preliminary objection is that the subject matter and the parties in High Court of Kenya Succession Cause No.246 of 1995 is the same as the subject matter and the parties in this suit.

The replying affidavit of Paul Kinyua Riungu has demonstrated that the parties and the subject matter in the two suits are similar.

The defendants/respondents are baffled as to why the Plaintiff/Applicant decided to file a new suit in spite of the pendency of High Court of Kenya Succession Cause No.246 of 1995. This action by the plaintiff/Applicant thus contravenes the provisions of section 6 of the Civil Procedure Act thus is an abuse of the Court process.

My Lord,

**The 2 main issues for determination before you in this matter are;**

- 1. Whether the Notice of Preliminary Objection is correctly before court.**
- 2. Whether the Present matter before court is Res-subjudice**

#### **1 .WHETHER THE NOTICE OF PRELIMINARY OBJECTION IS CORRECTLY BEFORE COURT**

**Order 2 Rule 9 of the Civil Procedure Rules provides;**

*A party may by his pleading raise any point of law.*

A preliminary objection should be raised on a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. In the case of; **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696;** the Court defined

*“...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”.*

Therefore at this stage, this Court is expected to consider legal issue(s) that go to the root of whether there is a competent suit before Court and/or whether the Court has/lacks jurisdiction to hear and determine such matter.

#### **2 .WHETHER THIS SUIT IS RES- SUBJUDICE**

**Section 6 of the Civil Procedure Act provides :**

*“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.”*

In **Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** the court held that:

*“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”*

The rationale for this principle was restated in **Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General** in which the Court held that:

*“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”*

In **Barclays Bank Of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012]eKLR** the court held that:

*“...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties...”*

In *Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR*; the Court opined that:

*“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”*

However in *Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR*

*“...In this case whereas it may be true that the issues in both suits may not be directly and substantially in issue, it is however clear that no matter how one looks at the dispute, the resolution thereof will ultimately depend on the determination of the question of the leadership of the Africa Independent Pentecostal Church of Africa. Even if this Court was to find that the cancellation of the subject agreement and the reconciliation by the Registrar was improper, the issue as to the leadership of the Church would still remain at large pending the determination of the other suit, assuming this suit would be determined earlier. On the other hand if that other suit were to be determined before these proceedings, the setting aside of the decision of the Registrar subsequent to the determination of the leadership of the Church would only cause confusion and chaos in a matter which is already riddled with a plethora of litigation...”*

My Lord the question before this court is if the Application for revocation of the grant and the resultant title deed in HC succession cause No.246 of 1995 at Meru is allowed, would this matter before you proceed?

An **order of status quo** allowing parties to continue using the parcels of land without interference pending the determination of the matter was issued in HC succession Cause No.246 of 1995 at Meru. This honourable court has thereafter issued an order barring the respondents from using the said parcel of land as they have been doing. What is the effect of these 2 conflicting orders on the general administration of Justice?

In this case, the court should stay this suit (subsequent suit) until the earlier suit (HC Succession cause 246 of 1995) is heard and determined.

It is important to also bring to the attention of this court that the High Court Succession Cause No. 246 of 1995 at Meru has been transferred to Chuka High court for hearing and determination.

In sum My Lord, we pray that this suit be dismissed or in the alternative be stayed until the High Court matter is heard and determined.

Dated at Chuka this 5<sup>th</sup> day of October 2020

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**MUTHOMI GITARI & CO**

**ADVOCATES FOR THE DEFENDANTS/RESPONDENTS**

4. The plaintiff's written submissions state as follows:

**PLAINTIFF'S/APPLICANT'S SUBMISSIONS IN OPPOSITION TO THE PRELIMINARY OBJECTION DATED 18.09.2020**

**INTRODUCTION**

Your Lordship, directed that this preliminary objection be disposed through written submission thus we so do herein.

Your Lordship, the preliminary objection is based on the provisions of section 6 of

The civil procedure act CAP 21 Laws of Kenya.

The defendants/respondents have clinched on the same.

My Lord what does the said section states?

**Section 6** of the **Civil Procedure Act** provides as hereunder:

*“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.”*

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My lord if any party brings an application that the suit is res judicata the same should have substantially have established so to avoid wastage of this court's time.

My Lord we are dealing with MERU HIGH COURT E.LC NO. 8 OF 2020 and the respondents are talking about MERU HIGH COURT SUCCESSION CAUSE NO.246 OF 1995.

Clearly what should we say as far as res judicata is concern?

We wish not to delve much on this issue since the law is extremely clear.

What is the title of the instant suit? Is it similar to the one in MERU HIGH COURT SUCCESSION CAUSE NO.246 OF 1995?

The answer is no.

My Lord, we wish to reproduce the two titles for the suits that are said to be res judicata for you to determine whether the suit herein is res judicata or not.

The other suit that is said to be similar to the instant suit is:-

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO.246 OF 1995**

**IN THE MATTER OF THE ESTATE OF KANGANGI KAIRARIA (DECEASED)**

**M'NDAKA KANGANGI GITONGA.....PETITIONER**

**VERSUS**

**JOSEPH MURUNGI GITONGA**

**PETER GITONGA MUTWAMWARI**

**BERNARD NJERU KARIUKI.....OBJECTORS/APPLICANTS**

From the above and annexures above it is clear that the parties in the two cases are different save for the plaintiff herein. Furthermore, this case concerns use of the land not ownership as the plaintiff is the registered owner.

My Lord, this preliminary objection is just brought so as to delay this court on dealing with the real issues as far as the matter herein is concerned.

Therefore we urge this honourable court to dismiss the preliminary objection with costs since the same is an abuse of the court process.

Without much ado, Your Lordship, we submit that the suit herein is not res jus judicata as alleged by the respondent.

We shall not reproduce what Section 6 of the Civil Procedure Act provides for.

The respondents are litigants who are out to waste the precious time of this court while they knows every litigation must come to an end as he very well knows that he has no chances to succeed.

My Lord, we have majored on the only title so as to save this Honourable Court's time in discussing the res judicata issue that the demagogue for many litigators who have the perception that they will lose in their frivolous case.

Succession No 246 of 1995 is a concluded matter although this matter of fact which can be dealt with during the hearing of this suit. Although not appropriate, we attach the confirmed grant in the said succession which concluded the said cause and there are no pending issues on distribution.

To sum up Your Honour, we wish to state that Section 3A of the Civil Procedure Act preserves the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process and as such we implore this court to allow the applicant's application.

## **CONCLUSION**

Your Honour, we submit that we have meticulously demonstrated that the preliminary objection herein is miserable and it ought to be dismissed. This is our humble submission for and on behalf of the respondent.

**DATED AT MERU THIS 9<sup>th</sup> DAY OF OCTOBER 2020**

**MUTEGI MUGAMBI & CO**

**ADVOCATES FOR THE APPLICANT**

5. I have perused the submissions and the authorities the parties have proffered in support of their diametrically incongruent assertions. All the authorities cited by the parties are good authorities in their facts and circumstances. I, however, opine that no two cases are congruent to a degree of mathematical certitude in their facts and circumstances.

6. Without taking too much judicial time, I do note that the plaintiff in this case is not party to Meru High Court Succession Cause No. 246 of 1995. Yes, there could be issues concerning the undesirability of courts of concurrent jurisdiction issuing conflicting orders. But pelucidly this suit is not res judicata Meru High Court Succession Cause No. 246 of 1995.

7. In the circumstances, the Notice of Preliminary Objection is hereby dismissed.

8. Costs shall be in the cause.

9. Interim orders issued concerning the plaintiff's application dated 5<sup>th</sup> August, 2020 are extended in terms of the provisions of Section 63 of the Civil Procedure Act.

10. The parties are concurrently directed to fully comply with Order 11, CPR within 21 days of today and come back to court for directions on **17<sup>th</sup> November, 2020**.

11. It is so ordered.

**Delivered in open Court at Chuka this 11<sup>th</sup> day of November, 2020 in the presence of:**

**CA: Ndegwa**

**Miss Materu h/b M/s Mutegi for the plaintiff.**

**Mark Muriithi h/b Muthomi Gitari for defendant.**

**P. M. NJOROGÉ,**

**JUDGE.**