



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 56 OF 2019

WANDEGEYA COMPANY LIMITED.....PLAINTIFF

VERSUS

JENNIFER MUTHONI MORIGI

JANE WANJIKU HIRAM

JULIA WAMBUI GAKUNGI (*Sued as trustees and officials of*

WOMEN TRUST HOUSING WELFARE ORGANIZATION.....1ST DEFENDANT

HOMELANDS DEVELOPMENT INVESTORS LTD.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE NATIONAL LAND COMMISSION.....4TH DEFENDANT

RULING

1. This Ruling is in respect to the Notice of Preliminary Objection dated 3rd March, 2020 and filed by the 2nd Defendant. In the said Notice of Preliminary Objection, the 2nd Defendant has averred as follows:

a) That the Plaintiff despite knowledge of a similar case to the instant one pending before the Machakos ELC No. 463 of 2017, a fact he has admitted, has proceeded to institute this suit seeking reliefs that ought to be rightfully determined in the said Machakos ELC No. 463 of 2017.

b) That the Plaintiff's suit amounts to sub judice and is in contravention of Section 6 of the Civil Procedure Act which states that:

“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.”

c) That the Plaintiff does not have the authorization to institute the instant suit, having failed to procure a Board Resolution from the Company's Directors.

d) That the Plaintiff's suit is fatally defective by virtue of the Plaintiff's locus to approach this Honourable Court.

2. The Notice of Preliminary Objection proceeded by way of written submissions. The 1st Defendant's advocate submitted that it is trite that a preliminary point should be premised on a point of law and that the test of whether an Application is a proper Preliminary Objection has been stated in the case of *Equity Bank Limited vs. Bryan Yongo & Another [2014] eKLR* where the court held that:

“Any true Preliminary Objection should not be entangled with factual issues.”

3. The 1st Defendant's counsel submitted that this position was espoused further in the case of *Mukisa Biscuits Manufacturing Ltd vs. West End Distributors (1969) EA 696* where their Lordships observed thus:

"...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 a contract giving rise to the suit to refer the dispute to arbitration."

4. Counsel submitted that the Preliminary Objection filed by the 2nd Defendant is premised on Section 6 of the Civil Procedure Act; that having a look at the pleadings filed by the Plaintiff in this case, it is evident that the main issue of contention is in regard to the ownership of parcel of land known as L.R. No. 20523 Mavoko (*I.R 206349*) and that Machakos ELC Case No. 463 of 2017 is canvassing on the same issue of ownership regarding the aforementioned suit property.

5. It was submitted by the 1st Defendant's advocate that the Plaintiff has apparently admitted in his pleadings that it was aware of the existence of Machakos ELC Case No. 463 of 2017 prior to the filing of this suit; that this suit is a clear abuse of the court process and an outright violation of the provisions of Section 6 of the Civil procedure Act and that the Plaintiff ought to have filed an Application to be enjoined as a party in the Machakos ELC Case No. 463 of 2017 rather than having the two cases consolidated.

6. Counsel submitted that the issues raised in the two suits are in regard to ownership of the suit property; that the Plaintiff is evidently misguided in requesting for consolidation of the two suits and that the issue of ownership can be conclusively determined in a single suit. Furthermore, it was submitted, Machakos ELC Case No. 463 of 2017 has substantively progressed and that the parties herein have always been ready to prosecute their claims.

7. Counsel submitted that the procedure for enjoining a necessary party to a suit is provided for under Order 1 Rule 10 (2) of the Civil Procedure Rules and that the move by the Plaintiff to file a separate suit against the Defendants is inconsistent with the overriding objective of the Civil Procedure Act.

8. It was submitted that the overriding objective of the Act is to facilitate just, expeditious, proportionate and affordable resolution of disputes and that a separate suit against the Defendants over the same subject matter would escalate costs even for the Plaintiff.

9. Counsel submitted that the scenario proposed by counsel for the Plaintiff has the prospects of undesirable result in judicial practice should this court arrive at two directly opposed verdicts in the two suits over the same property and that under the Civil Procedure Rules, any Application for consolidation of suits should be taken at the pre-trial conference of both suits and prior to hearing to avoid multiplicity of suits and achieve the overriding objective of the Civil Procedure Act, that is to save costs, time and effort by making the conduct of several actions into one action.

10. The Plaintiff's advocate submitted that Section 6 of the Civil Procedure Act makes it a requirement that for the *sub judice* principle to apply, a litigant must satisfy the following conditions: that the parties are the same in both matters; that the subject matter in question is the same and that the parties must be litigating under the same title.

11. It was submitted that the subject matter in relation to the suit herein and Machakos ELC. No. 463 of 2017, relate to the same parcel of land being L.R. No. 20523 (*I.R 206349*) situated in Mavoko Municipality in Machakos District; that the parties in both suits are different as in the present suit and that the power of the courts to make orders for consolidation as sought in the current Application stems from the provisions of Order 11 Rule 3(1) (h) of the Civil Procedure Rules which mandates the court to consider consolidation of suits with a view of furthering expeditious disposal of suits.

12. The Plaintiff's advocate submitted that the available remedy where a court is of the view that a matter is *sub judice* has never been to dismiss a suit but consolidation of the two suits in the spirit of the overriding objective of court. Counsel relied on the case of *Harid Dhanji Varsani vs. Hamisi Murinzi Kokoi & 3 others [2015] eKLR* where this court held as follows:

"It does not matter that the Plaintiff herein was aware of the existence of the Mombasa suit. I say so because most often than not, a party may not be able to effectively and sufficiently ventilate his case by joining an already existing suit. The most appropriate procedure in such a case is to file an independent suit and then seek for an order of consolidation, without offending the sub judice rule."

13. Counsel also relied on the case of *John Mwangi Wamai vs. Teresa Gathiri Mwema [2015] eKLR* where the court held as follows:

"Being of the view that the explanation offered by the 1st Defendant/Applicant is reasonable and being fully in agreement with the observations of Olao J., in Thiba Min Hydro Co. Ltd vs. Joseph Karu Ndwigwa(supra) to the effect that the remedy to a plea of sub judice is not to strike out a suit but either to have it stayed or consolidated and being satisfied that in the circumstances of this case it is in the interest of justice to have the issues raised in the two suits heard together, I find the application to be merited and allow the same in terms of prayer (1)."

14. It was submitted that striking of suits is a remedy of last resort; that the court should be cautious of striking out a suit before its logical determination and conclusion and that the consolidation of the two matters herein would be in tandem with the overriding objective set under Section 1A and 1B of the Civil Procedure Act.

15. The Plaintiff's counsel submitted that the Plaint filed on 13th June, 2019 is supported by the Verifying Affidavit sworn by Elizabeth Gitiri

Gacanja who is listed as a Director of the Plaintiff's Company as per the CR12 certificate produced at page 25 in the List of documents and that it is now settled law that a Director of a Company does not need the express written resolution of the other Directors or a special sitting before the filing of a suit or giving instructions to Advocates and that the Board resolution can always be ratified any time after filing the suit.

16. Counsel relied on the decision of Gikonyo J. in *Fubeco China Fushun vs. Naiposha Company Limited & 11 others* [2014] eKLR where the learned Judge held that:

“It was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company. In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the Advocates on record to commence this Application.”

17. It was submitted that the foregoing position was restated by the Court of Appeal in *Wanyiri Kihoro vs. Konahauthi Ltd* [2017] eKLR where the Appellate Court was in agreement that there is no need to have an express Board resolution for a Company's Director to instruct counsel to file pleadings.

18. This suit was commenced by way of a Plaint dated 13th May, 2019. In the Plaint, the Plaintiff averred that on 17th November, 1994, it acquired land known as L.R. No. 20523 Mavoko Municipality vide a Letter of Allotment; that it has been in possession of the said land and that it was subsequently issued with a title document in respect to the suit property.

19. In the Plaint, the Plaintiff is seeking to be declared the owner of the suit property and to have the Defendants restrained from interfering with its peaceful possession of the land. The Plaintiff pleaded in the Plaint the existence of Machakos ELC No. 463 of 2017 between the 1st and 2nd Defendants over the same subject land, and stated as follows:

“The Plaintiff shall move with alacrity to have the said suit consolidated with the one herein for expeditious disposal and uniformity in jurisprudence.”

20. The 2nd Defendant has sought in the Notice of Preliminary Objection to have the current suit struck out for being *sub judice* Machakos ELC Case No. 463 of 2017. According to the Defendants, the suit offends the mandatory 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.”

21. The law relating to what a Preliminary Objection entails is now settled. In the case of *Equity Bank Limited vs. Bryan Yongo & Another* [2014] eKLR the court held that:

“Any true Preliminary Objection should not be entangled with factual issues.”

22. This position was espoused in the case of *Mukisa Biscuits Manufacturing Ltd vs. West End Distributors* (1969) EA 696 where their lordships observed thus:

“...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 a contract giving rise to the suit to refer the dispute to arbitration.”

23. In the same case, *Sir Charles Newbold, P.* 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 judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

24. In *Oraro vs. Mbajja* [2005] eKLR, J.B. Ojwang J., (as he then was) stated that:

“I think the principle is abundantly clear. A “Preliminary Objection” correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be 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.’”

25. Indeed, the issue of whether this suit is *sub judice* Machakos ELC No. 463 of 2017 is a matter of law. While considering if a matter is *sub judice*, the court must be satisfied that the parties are the same in both matters or are litigating under the same title and that the subject matter in question is the same in the two suits.

26. The Plaintiff in this matter is not a party in Machakos ELC No. 463 of 2017. Indeed, there is no evidence before me to show that the Plaintiff herein is litigating under the same title with any of the parties in Machakos ELC No. 463 of 2017.

27. The Plaintiff's claim is that he owns the suit property and that he has a title document in its name. On the other hand, the Plaintiff's claim in Machakos ELC No. 463 of 2017 is that they own the suit property, and that the transfer of the suit property to the 2nd Defendant herein is a nullity. The Plaintiff's claim herein is therefore distinct and independent of the claim by the Defendants in Machakos ELC No. 463 of 2017.

28. Although the Plaintiff herein had the option of filing an Application for leave to be enjoined in Machakos ELC No. 463 of 2017, nothing barred it from filing this suit, and having the two suits consolidated. This is the position that this court took in the case of *Harid Dhanji Varsani vs. Hamisi Murinzi Kokoi & 3 others [2015] eKLR* where it held as follows:

“It does not matter that the Plaintiff herein was aware of the existence of the Mombasa suit. I say so because most often than not, a party may not be able to effectively and sufficiently ventilate his case by joining an already existing suit. The most appropriate procedure in such a case is to file an independent suit and then seek for an order of consolidation, without offending the sub judice rule.”

29. Considering that the Plaintiff is not litigating under the same title as the parties in Machakos ELC No. 463 of 2017, and the parties in the two matters being different, it is my finding that the current suit is not *sub judice* Machakos ELC No. 463 of 2017.

30. The 2nd Defendant has argued in the Notice of Preliminary Objection that this suit should be struck out because the Plaintiff does not have the resolution of the Board to commence this suit. The issue of whether the Plaintiff has a resolution of the Board to commence this suit or not is a factual issue that can only be determined at the hearing.

31. As was held in *Oraro (supra)*, any assertion which claims to be a 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.

32. That being the case, the issue of whether there is in existence a Board resolution by the Plaintiff to commence this suit or not can only be determined after trial, and not at this stage. Indeed, the court will have to be furnished with the Plaintiff's List of Directors and the Plaintiff's Memorandum and Articles of Association, to be able to ascertain if the said resolution was required in the first place, and if so, if it was ever obtained.

33. For those reasons, I find the Notice of Preliminary Objection by the 2nd Defendant dated 3rd March, 2020 to be unmeritorious. The said Notice of Preliminary Objection is dismissed with costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 6TH NOVEMBER, 2020.

O. A. ANGOTE

JUDGE