



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 280 OF 2017**

**NJOWABU KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**JINIT MOHANLAL SHAH.....DEFENDANT**

**BY WAY OF COUNTER CLAIM**

**JINIT MOHANLAL SHAH..... PLAINTIFF/RESPONDENT**

**VERSUS**

**NJOWAMBU KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF SURBEY KENYA.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES.....3<sup>RD</sup> DEFENDANT**

**KIAMBU COUNTY GOVERNMENT.....4<sup>TH</sup> DEFENDANT/OBJECTOR**

**NATIONAL LAND COMMISSION.....5<sup>TH</sup> DEFENDANT**

**RULING**

The matter for determination is the Notice of Preliminary Objection dated **6<sup>th</sup> November 2019** by the 4<sup>th</sup> Defendant/ Objector rising an Objection to the Counter claim dated **28<sup>th</sup> November 2018** on the grounds that;

- 1. THAT this Honourable Court lacks jurisdiction to hear and determine the Counter claim filed against the 4<sup>th</sup> defendant to the Counter claim herein**
- 2. THAT the present suit filed against the 4<sup>th</sup> Defendant to the Counter claim by the Plaintiff to the Counter Claim amounts to sub judice**
- 3. THAT the subject matter and the issue herein raised against the 4<sup>th</sup> defendant to the Counter Claim by the Plaintiff to the Counter Claim are the same in Nairobi ELC No. 1191 of 2013.**
- 4. THAT the Plaintiff to the Counter Claim herein is the 6<sup>th</sup> Plaintiff therein and is seeking similar orders against the 4<sup>th</sup> Defendant to the Counter Claim herein who is the Defendant therein**
- 5. THAT there would be no purpose in proceedings on with this matter and yet the same issues are before another court. As a result, this may lead to parallel decisions in multiple forums to the detriment of the 4<sup>th</sup> Defendant to the Counter claim.**
- 6. THAT the Counter claim as filed and pleaded against the 4<sup>th</sup> defendant to the Counter Claim is frivolous, vexatious and otherwise an abuse of the Court process.**

On the 29<sup>th</sup> April 2020, the Court directed the parties to canvass the **Preliminary Objection**, by way of written submissions. In compliance

with the said order the 4<sup>th</sup> Defendant/ Objector through its **Legal Counsel J.J Cheserek**, filed its written submissions dated **1<sup>st</sup> October 2020** and submitted that the Court does not have jurisdiction to hear the Counter Claim as the same falls short on the doctrine of **Sub judice** under **section 6 of the Civil Procedure Act**. The 4<sup>th</sup> Defendant/ Objector relied on various decided cases amongst them the case of **Barclays Bank Of Kenya Ltd...Vs... Elizabeth Agidza & 2 Others [2012] eKLR**, where 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.”*

It was submitted that there is no purpose in proceeding with the suit and yet the issues are before another Court with competent jurisdiction

The **Preliminary Objection** is opposed and the Plaintiff in the Counter Claim filed his written submission through the **Law Firm of Menezes & Partners Advocates** dated **6<sup>th</sup> October 2020**, and submitted that the parties in the instant suit and those in **ELC 1191 of 2013** are not the same and that there are 6 other Plaintiffs in the Nairobi case. It was further submitted that the prayers sought are not the same as their claim in **ELC No. 1191 of 2013**, arises from the malicious demolition and destruction of boundary walls on the respective suit properties and therefore the Plaintiffs in the said suit have sought for permanent injunction and damages for malicious demolition while in the instant suit the Plaintiff in the Counter claim is seeking for several reliefs arising from the fraudulent illegal and negligent alienation of its parcel of land.

It was further submitted that in order for Res judicata to be successfully pleaded, **section 7 of the Civil Procedure Act** has enunciated the clear conditions which must be satisfied which conditions must be satisfied conjunctively. The Plaintiff in the Counter claim relied on various decided cases and urged the Court to dismiss the preliminary Objection

The 4<sup>th</sup> Defendant/Objector in its further submissions dated **12<sup>th</sup> October 2020**, and submitted that the **Preliminary Objection** is anchored on the principle of sub judice and not the issue of Res Judicata under Section 7. It was further submitted that the subject matter in **ELC 1191 of 2013**, and the subject matter in the instant suit are practically the same in so far as the claim by the Plaintiff to the Counter claim in both suits is concerned. Further that the parties in the said case are also the same. It was also submitted that the difference between the instant suit and the suit in Nairobi is that the suit was jointly filed but each Plaintiff had a specific claim against the County Government of Kiambu.

Further that the Plaintiff in the Counter claim is responding to an issue of **Res Judicata** which was not raised begging the question as to whether the Plaintiff is privity to the information that **ELC 1191 of 2013**, is concluded. That in the event that the Court is to hold that the parties in both suits are not the same, then the suit is till barred by the doctrine of Estoppel.

The 4<sup>th</sup> Defendant/Objector relied on the case of Silas **make Otuke ....Vs... attorney General & 3 others (2014) eklr** where the Court held that;

*“... issue estoppel can and dose arise even where parties were not involved in prior litigation.”*

Further that the Court ought to uphold the 4<sup>th</sup> Defendant's/ Objector's Preliminary Objection. The Court has now carefully read and considered the Preliminary Objections together with the rival written submissions and renders itself as follows:-

For the Court to determine whether or not the Preliminary Objection is merited, it must first determine whether the same qualifies to be a Preliminary Objection as per the description of a Preliminary Objection and then determines its merit.

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean: -

*“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”.*

Further Sir **Charles Nabbold, JA** stated that:-

*“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The*

*improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.*

From the above the description, it is clear that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. See the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

***“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”***

Having established what a Preliminary objection is, the Court must first determine whether what has been raised by the 4<sup>th</sup> Defendant/ Objector satisfy the ingredients of a **Preliminary Objection**. In this determination, the Court will be persuaded by the findings in the case of **Oraro...Vs...Mbaja(2005) 1KLR 141**, where it was held that:-

***“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.***

The 4<sup>th</sup> Defendant/ Objector has in its Preliminary Objection raised two issues, that the suit is subjudice and an abuse of the Court process and thus vexatious. From the above description of what a Preliminary Objection is and when it ought to be raised, it is not in doubt that it **ought not** to be raised when ascertainment of facts is required, and when raised, it should be capable of disposing of the suit.

The foot note to **Section 6 of the Civil Procedure Act** that deals with **Sub judice** is to the effect that if a Court finds that the matter is sub judice, then the Court ought to stay the suit and therefore the same is not capable of disposing of the suit preliminarily.

Further for the Court to determine whether the issues herein were directly and substantially in issue with the other suit, the Court will have to ascertain facts and probing of evidence. Further the issue on whether or not the same is **Subjudice**, facts have to be ascertained. Further, a Preliminary Objection cannot be raised on disputed facts. Having gone through the parties submissions, it is thus clear that there are disputed facts on the prayers sought and whether or not the parties are the same. These issues cannot be ascertained without the probing of evidence. See the case of **Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) EKLR**, where the Court held that:

***“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.***

Further in the case of **George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR**, the Court held that: -

***“I have considered the points raised by the 1<sup>st</sup> Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.***

It is Court’s considered view that the issue of whether or not the instant suit is vexatious and or an abuse of the Court process will also require the probing of evidence and ascertainment of facts and cannot be raised as Preliminary Objection

Therefore, this Court holds and finds that what has been raised by the 4<sup>th</sup> Defendant/Objector does not amount to a **Preliminary Objection**.

Consequently, the Court finds and holds that the Preliminary Objection is not properly raised and not merited. The said Preliminary Objection dated 6<sup>th</sup> November 2019 is dismissed entirely with costs to the Plaintiff to the Counter claim.

It is so ordered.

Dated, signed and Delivered at **Thika** this 3<sup>rd</sup> day of December, 2020.

L. GACHERU

JUDGE

3/12/2020

Court Assistant – Lucy

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by

His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**No Appearance for the Plaintiff**

**No Appearance for the Defendant /Plaintiff in the Counter Claim**

**No Appearance for the 1<sup>st</sup> Defendant**

**No Appearance for the 2<sup>nd</sup> Defendant**

**No Appearance for the 3<sup>RD</sup> Defendant**

**No Appearance for the 4<sup>th</sup> Defendant/ Objector**

**No Appearance for the 5<sup>th</sup> Defendant**

**L. GACHERU**

**JUDGE**

**3/12/2020**