



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.150 OF 2015(OS)

IN THE MATTER OF: LAND ADJUDICATION AND SETTLEMENT ACT CAP 300 LAWS OF KENYA

IN THE MATTER OF: VESTING ORDER AND REVERTING L.R. MIDA CREEK FARM XVII/13/2 FROM ZAMZUG INVESTMENT LTD TO PETER BAMBULA MJAMBILI

IN THE MATTER OF: REGISTRAR OF LAND TO REVERT THE TITLE NO. L.R. MIDA CREEK FARM XVII/13/212 FROM ZUMZUG

INVESTMENTS LTD TO PETER BAMBULA MJAMBILI

BETWEEN

PETER BAMBULA MJAMBILI.....PLAINTIFF/APPLICANT

AND

ZUMZUG INVESTMENT LIMITED

REGISTRAR OF LANDS KILIFI.....DEFENDANTS/RESPONDENTS

RULING

1. By a Notice of Motion application dated 21st December 2017, four individuals describing themselves as the Intended Defendants/Applicants namely Aisha Said Amri, Mwanajuma Juma, Fatuma Juma and Mwanapili Said sought Orders as follows:-

- 2. There be a stay of any further proceedings in the matter herein pending the hearing and determination of this application;***
- 3. This Honourable Court be pleased to set aside the Judgment delivered herein on the 24th day of June 2016 and all consequential orders thereto;***
- 4. This Honourable Court be pleased to grant leave to enjoin Aisha Said Amri, Mwanajuma Juma, Fatuma Juma and Mwanapili Said as parties to this suit;***
- 5. The Defendant(sic) be granted unconditional leave to defend this suit and file a Defence within such time as this Honourable Court may deem fit; and***
- 6. The costs of this application be provided for.***

2. Upon being served with the said application, the Plaintiff proceeded to Court on 26th June 2018 and filed a Notice of Preliminary Objection to the application on the grounds that:-

i) The Honourable Judge J.O. Olola on the 25th May 2018 already made a determination with an order in ELC App No. 10 of 2017 Winnie Mwaka Mjambili & 2 Others –vs- Aisha Said Amri & Another dismissing with costs a similar application seeking the same Orders at Paragraph 12 of the Ruling by pronouncing the following:-

“In the result, I do not find any merit in enjoining the Applicant to the matter at this stage neither do I find any reason to set aside the proceedings in ELC No. 150 of 2017.

2. The applicants have already filed a “Notice of Appeal” dated 6th June 2018 being dissatisfied with the Ruling of the Honourable J. O. Olola delivered at Malindi on 25th May 2018 and intends to Appeal against that decision which either might conflict with the decision of the Court or the Court shall be exposed to the risk of contradicting what has already been heard and determined in ELC No. 10 of 2017 Winnie Mwaka Mjambili & 2 Others –vs- Aisha Said Amri & Another and hence the rule of Res Judicata applies;

3. The Court is ‘Functus Officio’ and therefore lacks the jurisdiction to entertain the application.

3. On 28th June 2018 when the application came up for hearing, the parties agreed to first dispose of the Notice of Preliminary Objection. I have accordingly considered the Objection and the oral submissions made by the Learned Advocates for the Plaintiff and the Intended Defendants.

4. As was stated by the Court of Appeal in Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors Ltd(1969) EA 695:-

“A Preliminary Objection is in the nature of what used to be a demurer. 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.

5. In the matter before me, Mr. Tindi, Learned Counsel for the Plaintiff, submitted that this Court had already dealt with a similar application dated 9th October 2017. It was Counsel’s submission that the application offends the doctrine of res Judicata as captured under Section 7 of the Civil Procedure Act as the parties herein are the same as those in the former application where the Court delivered its Ruling on 25th May 2018.

6. The Plaintiff’s Counsel further submitted that the Applicants herein had filed a Notice of Appeal in regard to the said Ruling and it was only fair that they proceed to the Court of Appeal for redress as this Court was now *functus officio*.

7. I note from the pleadings and the submissions herein that the application to which the Plaintiff objects was filed herein on 22nd December 2017 while the Ruling referred to was made on 25th May 2018-in regard to an application said to be dated 9th October 2017.

8. The Ruling in regard to the application dated 9th October 2017 was made in Malindi ELC No. 10 of 2017, a matter which is separate and distinct from the matter presently before me. In this regard, I think it was incumbent upon counsel for the Plaintiff to place sufficient material before this Court to show that the dispute herein is the same as in the aforementioned matter and that there was a final determination made on the same.

9. As it were, in the form in which the Objection is drawn, this Court is being invited by the Plaintiff to go into the archives to pull out the said Malindi ELC No. 10 of 2017 and to proceed thereafter to identify the matter on its own and to determine whether the dispute herein is between the same parties. In this regard, I agree with Mr. Ole Kina, Learned Counsel for the Intended Defendants that such an objection, where the Court has to ascertain the facts from elsewhere, does not meet the standard set out in the Mukisa Biscuits Case(Supra).

10. In a matter such as this, the Plaintiff ought to have filed a formal application and/or filed an Affidavit in reply to the application wherein he would attach documentation including evidence of the alleged filing of the Notice of Appeal which was again submitted upon from the bar.

11. Otherwise the Preliminary Objection as formulated herein is bare and bereft of any sufficient material to enable the Court to know the nature of the dispute and to make a proper and effectual determination of the issues raised. The practice of taking shortcuts by raising issues which are unsubstantiated as Preliminary Objections ought to be discouraged as they merely amount to wastage of the Court’s time.

12. In the result, the Preliminary Objection dated and filed herein on 26th June 2018 is dismissed with costs.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE