



**REPUBLIC OF KENYA**

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

**ELC CASE NO.238 OF 2018**

**HANNAH WANJA NJENGA And**

**JOSEPH MUCHAI (Suing as administrators**

**of the Estate of the late PETER KIMARI KAMIRA**

**alias KIMARI KIMIRA).....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**PETER KIARIE WARUI.....1<sup>ST</sup> DEFENDANT/OBJECTOR**

**GEORGE NJANGI KIMANI.....2<sup>ND</sup> DEFENDANT/OBJECTOR**

**THE DISTRICT LAND REGISTRAR,**

**KIAMBU COUNTY.....3<sup>RD</sup> DEFENDANT**

**FAMILY BANK LIMITED.....4<sup>TH</sup> DEFENDANT**

**CONSOLIDATED BANK OF KENYA LTD.....5<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiffs herein filed this claim against the Defendants and sought for various prayers among them a declaration that the subdivision of **LR.No.Ndumberi/Riabai/101** into, **LR.No.Ndumberi/Riabai/5335, 5336, 5337 and 5338** and any other subsequent transfer and transactions therein are **null** and **void**.

Simultaneously, the Plaintiffs also filed a **Notice of Motion** application under **Certificate of Urgency** and sought for injunctive or restraining orders against the Defendants from dealing in any way with title **No.Ndumberi/Riabai/5335,5336,5337 and 5338**. The court granted interim orders on the first instance which orders have been extended severally.

In contesting the said **Notice of Motion**, and the whole suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a **Replying Affidavit** sworn by **Peter Kiarie Warui**, the 1<sup>st</sup> Defendant on **11<sup>th</sup> October 2018** together with **Notice of Preliminary Objection**, wherein the 1<sup>st</sup> and 2<sup>nd</sup> Defendant averred that:-

- 1. That the Application is incurably defective, bad in law and does not lie.**
- 2. That the said application is misconceived, incompetent, defective and bad in law.**
- 3. That the suit herein is Res judicata.**
- 4. That the said application and suit are an abuse of the court process and ought to be dismissed with costs on the basis that the suit herein is essentially an unprocedural appeal against Kiambu Civil Case No.149 of 1989.**

The Court directed that the **Preliminary Objection** be canvassed first by way of written submissions. The **Law Firm of Gatitu Wang'oo & Co. Advocates** for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed the written submissions on **29<sup>th</sup> October 2018** and urged the Court to uphold the

**Preliminary Objection** and strike out the entire suit with costs. They relied on various decided cases.

The **Law Firm of Mwaniki Gachoka & Co. Advocates** filed their written submissions on **21<sup>st</sup> November 2018** and urged the Court to dismiss the instant **Notice of Preliminary Objection** with costs.

The Court has considered the instant **Notice of Preliminary Objection** and the rival written submissions and the relevant provisions of law and finds that basically the issue for determination are:-

*i. Whether the matter is Resjudicata.*

*ii. Whether the suit was improperly, irregularly filed and whether the same is misconceived and an abuse of the court process.*

Before delving into the merit of the **Notice of Preliminary Objection**, the Court will first determine whether what has been raised amounts to a **Preliminary Objection**.

A **Preliminary Objection** was described in the case of **Mukisa Biscuits & 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, it is evident that a **Preliminary Objection** raises pure points of law and is capable of bringing the matter to an end preliminarily. 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.”**

It is also evident that the **Preliminary Objection** stems from the pleadings, and there should be no instances where the court will have to turn elsewhere to ascertain facts. See the case of **Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the Court held that:-

**“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have averred that the suit herein is incurably defective, bad in law and does not lie. Further that the suit is **misconceived, incompetent, defective** and an **abuse** of the court process. For the court to determine whether the suit is **defective** or **bad in law**, it has to consider the pleadings and does not need to ascertain any facts. Further the issue of whether the suit is **bad in law, incompetent** and **misconceived** are points of law which objection if upheld, is capable of bringing the suit to an end preliminarily.

Therefore, the Court finds that though the issue of *Res judicata* sometimes requires ascertaining of facts by having to consider the alleged previous suits, the Court finds that the other points raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are pure points of law and therefore qualifies this **Notice of Preliminary Objection** to be a **Preliminary Objection** as envisaged or described in the **Mukisa Biscuits Case (supra)**.

On the merit of the **Preliminary Objection**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have averred that the suit herein is *Resjudicata*. *Resjudicata* means a **‘thing adjudicated’** as per the **Black Law Dictionary, 9<sup>th</sup> Edition**.

**Section 7** of the **Civil Procedure Act** provides as follows:-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have alleged that the issues raised herein were determined in **Kiambu Civil Case No.149 of 1989**, wherein the Court held that **LR.No.Ndumberi/Riabai/101**, be divided and shared equally between **Kimari Kimira** and **Kimani Kimira**. Further that issues raised herein were also raised in **Succession Cause No.282 of 2018**, wherein the Court dealt with the Estate of **Kimari Kimira**.

However, the Plaintiffs have submitted that the issues raised in **Kiambu Civil Case No.149 of 1989**, are totally different with the issues

herein. Whereas ***Kiambu Civil Case NO.149 of 1989***, dealt with who was entitled to the land parcel ***No.Ndumberi/Riabai/101*** and to what size of the suit, the suit herein deals with illegal and fraudulent transfer of ***Kamira Kimira's*** (deceased) portion of land after the said equally sharing as directed by the court in ***Civil Suit No.149 of 1989***.

The Court has considered the pleadings herein and it is indeed correct that the Plaintiffs are alleging that the share that was meant to be for ***Kamira Kimira*** was distributed to persons who were not beneficiaries of his estate. The issues pleaded by Plaintiffs are issues of fraud. Though touching on the same suit property, the issues herein are different from the issues raised on ***Kiambu Civil suit No.149 of 1989***.

The other issues raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are that the suit is an ***abuse of the court process, incompetent, defective and misconceived***. Apart from the issue of abuse of the court process, the Objectors did not expound on the other points.

The Objectors have alleged that the Plaintiffs have abused the court process because the issues herein had been dealt with in other suits that is ***Kiambu Civil Case No.149 of 1989*** and ***Succession Cause No.282 of 2018***.

Therefore by bringing this matter, that amounts to multiplicity of actions and therefore an abuse of the court process. However, as the court pointed out earlier, the issues raised herein touches on fraud and illegal transfer of a share of deceased parcel of land to non-beneficiaries. Therefore, the Court finds that these are new issues which require a proper determination by the court.

For the above reasons, the Court finds that the ***Notice of Preliminary Objection*** herein ***is not merited***. The ***same is dismissed entirely with costs to the Plaintiffs herein***.

It is so ordered.

***Dated, Signed and Delivered at Thika this 18<sup>th</sup> day of March 2019.***

**L. GACHERU**

**JUDGE**

**18/3/2019**

In the presence of

M/S Mugi holding brief for Mr. Gachoka for Plaintiffs/Respondents

M/S Mokaya holding brief for Mr. Gatitu for 1<sup>st</sup> & 2<sup>nd</sup> Defendants/Objectors

No appearance for 3<sup>rd</sup> Defendant

No appearance for 4<sup>th</sup> Defendant

Lucy - Court Assistant

**L. GACHERU**

**JUDGE**

**18/3/2019**