



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 156 OF 2017**

**MARGARET NTHAMBI KIEMA.....PLAINTIFF**

**VERSUS**

**DAUDI MUTULE NGUTU.....DEFENDANT**

**RULING**

1. What is before this court for ruling is the Defendant's Notice of Preliminary Objection dated 18<sup>th</sup> June, 2018 and filed in this Court on 19<sup>th</sup> June, 2018. The Defendant has raised the following grounds:-

- 1) **The Suit is Res Judicata, incompetent, misconceived and devoid of any merit in view of its own contents.**
- 2) **That the claim is filed contrary to section 7 of the Civil Procedure Act, 2010 and section 29 of the Land Adjudication Act and therefore the Honourable Court lacks jurisdiction to grant the orders prayed for.**
- 3) **The instant Claim is a disguised attempt by the Plaintiff to have this Court adjudicate the issue of Land ownership of P/No.324 yet this issue was adjudicated upon before the District Land Adjudication & Settlement Officer and no appeal was preferred by the Plaintiff in accordance with the Land Adjudication Act.**
- 4) **That the claim is bad in law, vexatious and an abuse of the court process.**
- 5) **The suit as drawn and filed is incompetent and fatally defective and therefore it should be struck out.**
- 6) **That the claim against the Defendant should be dismissed with costs to the Defendant.**

2. On the 05<sup>th</sup> October, 2018, the Defendant filed an affidavit in support of the Preliminary Objection dated 18<sup>th</sup> June, 2018. The said affidavit in support of the Preliminary Objection was sworn at Nairobi on the 13<sup>th</sup> September, 2018.

3. On the 25<sup>th</sup> October, 2018 the Plaintiff filed a Preliminary Objection of her own dated 18<sup>th</sup> October, 2018. It is directed at the Defendant's Preliminary Objection. The grounds raised by the Plaintiff's Preliminary Objection are:-

1. **THAT filing of an affidavit in support of a Preliminary Objection is bad in law and the same ought to be struck out as it is the antithesis of what constitutes a Preliminary Objection.**
2. **The Defendant did not seek and could not obtain any window for the filing of affidavit evidence in support of a Preliminary Objection filed by himself.**
3. **The submissions based on the impugned affidavit ought to be struck out.**
4. **The approach to Court by the Defendant is irregular, mischievous and at best avant-garde and should not be entertained.**

4. The court directed that the application be disposed off by way of written submissions. By the time of writing this ruling, it is only the Defendant's Counsel who had filed his submissions.

5. The submissions are that the Plaintiff's suit through the plaint dated 26<sup>th</sup> February, 2015 is res judicata as it seeks to present before the court for determination issues that were directly and substantially in issue for determination before the District Land Adjudication and Settlement Officer between the same parties. The Counsel added that a decision thereof was rendered by the District Land Adjudication &

Settlement Offices on 1<sup>st</sup> July, 2011 and it was therefore not open to the Plaintiff to bring the same issues before this court. The Counsel cited the case of **Mukisa Biscuits Manufactures Co Ltd vs. West End Distributors Ltd [1969] EA 698** where Sir Charles Newbold P stated thus,

*“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 Counsel further cited the case of **Attorney General & Another vs. Andrew Maina Githinji & Another [2016] eKLR** where Law J cited with approval the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (supra)** and stated thus,

*“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.”*

The Counsel further cited **Section 7 of the Civil Procedure Act** which provides as follows regarding “res judicata”.

*“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”*

6. I have read the submissions that were filed herein as well as the authorities that were cited by the Defendant’s Counsel. **Section 3 of the Interpretation and General Provisions Act Chapter 2 Revised Edition 2014 [2012]** defines a Court as,

*“... any court of Kenya of competent jurisdiction. My reading of Section 7 of the Civil Procedure Act is that courts are barred from trying suits or issue which the matter directly or substantially in issue has been in issue in a former suit involving the same parties or between parties under whom they or any of them claim....”*

Whereas it is not in dispute that the issues were determined on 01<sup>st</sup> July, 2011 by the District Land Adjudication and Settlement officer, it was upon the Defendant’s Counsel to prove that the said officer is a court of Kenya of competent jurisdiction. In my view the District Land Adjudication and Settlement Officer is not a court of competent jurisdiction and as such, I hold that this suit is not res judicata since there is no evidence that the issues in dispute were determined by a court of competent jurisdiction. I therefore proceed to dismiss the Defendant’s Preliminary Objection. Since the Plaintiff did not actively prosecute his objection to the Defendant’s supporting affidavit dated 18<sup>th</sup> June, 2018 and I direct that each party shall bear their own cost.

**Signed, dated and delivered at Makueni this 13<sup>th</sup> day of May, 2019.**

**MBOGO C.G**

**JUDGE**

**In the presence of:-**

Mr. Makundi for the Plaintiff

Ms. C. Nzioka - Court Assistant

No appearance for the Defendant

**MBOGO C.G., JUDGE,**

**13/05/2019.**