



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 8 OF 2019**

STEPHEN NDUNGU MBURU - 1<sup>ST</sup> PLAINTIFF/APPLICANT

JOHN KAMAU CHEGE - 2<sup>ND</sup> PLAINTIFF/APPLICANT

GEOFFREY MAINA KAGIA - 3<sup>RD</sup> PLAINTIFF/APPLICANT

JOSIPHINE WAMBUI - 4<sup>TH</sup> PLAINTIFF/APPLICANT

JAMES MUIRURI - 5<sup>TH</sup> PLAINTIFF/APPLICANT

JAMES NGURI - 6<sup>TH</sup> PLAINTIFF/APPLICANT

ANDREW MAINGI - 7<sup>TH</sup> PLAINTIFF/APPLICANT

BENSON MUGU - 8<sup>TH</sup> PLAINTIFF/APPLICANT

KAMANDE KINGA - 9<sup>TH</sup> PLAINTIFF/APPLICANT

REUBEN MWEWA - 10<sup>TH</sup> PLAINTIFF/APPLICANT

MUTINDA JAMES - 11<sup>TH</sup> PLAINTIFF/APPLICANT

THOMAS NJOROGE - 12<sup>TH</sup> PLAINTIFF/APPLICANT

PETER WAMITHI - 13<sup>TH</sup> PLAINTIFF/APPLICANT

MARY MUTHONI - 14<sup>TH</sup> PLAINTIFF/APPLICANT

AGNES WAIRIMU - 15<sup>TH</sup> PLAINTIFF/APPLICANT

BERNARD MUHIA - 16<sup>TH</sup> PLAINTIFF/APPLICANT

GEORGE NDUNGU - 17<sup>TH</sup> PLAINTIFF/APPLICANT

JOEL MACHARIA - 18<sup>TH</sup> PLAINTIFF/APPLICANT

HANNAH WANGUI - 19<sup>TH</sup> PLAINTIFF/APPLICANT

MARY WANGARI - 20<sup>TH</sup> PLAINTIFF/APPLICANT

JOHN MWANGI - 21<sup>ST</sup> PLAINTIFF/APPLICANT

PETER NJOROGE - 22<sup>ND</sup> PLAINTIFF/APPLICANT

SIMON CHEGE - 23<sup>RD</sup> PLAINTIFF/APPLICANT

FELISTER WAMBUI - 24<sup>TH</sup> PLAINTIFF/APPLICANT

KIBE KIMANI - 25<sup>TH</sup> PLAINTIFF/APPLICANT

ZAKARIA KARIUKI - 26<sup>TH</sup> PLAINTIFF/APPLICANT

MOSES MUNGAI - 27<sup>TH</sup> PLAINTIFF/APPLICANT

RUTH MUGURE - 28<sup>TH</sup> PLAINTIFF/APPLICANT

JOHN NGUGI - 29<sup>TH</sup> PLAINTIFF/APPLICANT

JAMES MURIGI - 30<sup>TH</sup> PLAINTIFF/APPLICANT

JOSEPH NGIGI - 31<sup>ST</sup> PLAINTIFF/APPLICANT

JAMES MACHARIA - 32<sup>ND</sup> PLAINTIFF/APPLICANT

PHOEBE WAITHIRA - 33<sup>RD</sup> PLAINTIFF/APPLICANT

PETER KIRORI - 34<sup>TH</sup> PLAINTIFF/APPLICANT

PETER MUHIA - 35<sup>TH</sup> PLAINTIFF/APPLICANT

ESTHER NJOKI - 36<sup>TH</sup> PLAINTIFF/APPLICANT

ESTHER MUTHONI - 37<sup>TH</sup> PLAINTIFF/APPLICANT

WANGUI MOSES - 38<sup>TH</sup> PLAINTIFF/APPLICANT

JAMES KARIUKI - 39<sup>TH</sup> PLAINTIFF/APPLICANT

PETER KAMANDE - 40<sup>TH</sup> PLAINTIFF/APPLICANT

RUEBEN MUIRURI - 41<sup>ST</sup> PLAINTIFF/APPLICANT

GRACE MUGURE - 42<sup>ND</sup> PLAINTIFF/APPLICANT

MARY WANGECI - 43<sup>RD</sup> PLAINTIFF/APPLICANT

JOSEPHINE KURI - 44<sup>TH</sup> PLAINTIFF/APPLICANT

ALICE MUTHONI - 45<sup>TH</sup> PLAINTIFF/APPLICANT

PETER NJOROGE - 46<sup>TH</sup> PLAINTIFF/APPLICANT

JAMES KIRITU - 47<sup>TH</sup> PLAINTIFF/APPLICANT

JANE MUTHONI - 48<sup>TH</sup> PLAINTIFF/APPLICANT

LILIAN MUMBI - 49<sup>TH</sup> PLAINTIFF/APPLICANT

SARAH NYAMBURA - 50<sup>TH</sup> PLAINTIFF/APPLICANT

MARTHA MUTHONI - 51<sup>ST</sup> PLAINTIFF/APPLICANT

VS

NELSON NDUNGU - 1<sup>ST</sup> DEFENDANT /RESPONDENT

PAUL MAINA - 2<sup>ND</sup> DEFENDANT/RESPONDENT

FREDRICK WAINAINA NJOROGE - 3<sup>RD</sup> DEFENDANT /RESPONDENT

PETERSON NDUNGU - 4<sup>TH</sup> DEFENDANT/RESPONDENT

TERESIAH NYAMBURA - 5<sup>TH</sup> DEFENDANT/RESPONDENT

#### RULING

1. On the 21/3/19 the Plaintiffs filed suit against the Defendants seeking interalia orders to restrain the Defendant from interfering with the suit land MAKUYU/MAKUYU/BLOCK 1/2097. Simultaneously the Plaintiffs filed a motion under certificate of urgency seeking similar orders in the plaint albeit temporarily.

2. The Defendants as would be expected denied the Plaintiffs claim and under para 11 pleaded that there is a pending suit involving the parties to wit; CMCC No 38 of 2003 at Thika between the 1<sup>st</sup> Plaintiff and PundaMillia Farmers' Cooperative Society (hereinafter referred to as the society) of which the Defendants are the officials of the society and the subject property remains the suit property herein.

3. True to their word, the Respondents filed a Preliminary Objection opposing the Applicant's motion on grounds that;

a. The application is an abuse of the Court process in that similar application by the 1<sup>st</sup> Applicant is pending before the Chief Magistrates Court in CMCC D.O NO 38 OF 2003, Thika.

b. The application is bad in law frivolous vexatious and lacks merits.

4. It is supported by the Replying Affidavit of 1<sup>st</sup> Respondent in which he depones that the 1<sup>st</sup> Applicant is a member of the society where he is the current chairman and the Respondents are his officials. He asserted that the 50 Plaintiffs are not members of the society and attached a list of which he claims are genuine members. That the suit land was allocated to 66 members of the society in 1997, none of which are the Plaintiffs. That the suit land is not a dam. That the 1<sup>st</sup> Applicant filed an application on 8/2/18 against the society seeking to attach the suit land to satisfy a decree in favour of the 1<sup>st</sup> Applicant. This application was dismissed on the 27/8/18. Dissatisfied with the said decision of the lower Court he again filed another application dated the 27/8/18 seeking orders to restrain the society from selling transferring the suit land to a third party. This application was due to be heard on the 2/7/19 at the Chief Magistrates Court at Thika. The Respondent argues that the 1<sup>st</sup> Applicant is abusing the Court process by filing the instant application.

5. The Preliminary Objection is opposed. The Applicants submitted that the issues in CMCC No 38 of 2003 are different on the following grounds; the application in the lower Court dealt purely with warrants of attachment towards settlement of a decree against the society in which the society was directed to give the 1<sup>st</sup> Applicant land measuring 0.97 ha and in the alternative 0.27 as additional entitlement. That the issue before the Court now is ownership of the suit land that is to say whether or not the suit land is a public utility land (public land). They submitted that though both applications seek preservative orders against the same suit land, the issue of ownership of the suit land has not been determined. That the current suit involves parties who were not parties in the case in the lower Court. The cause of action, they argued is also different.

6. The Respondents on the other hand submitted that this application is the same as that pending in the lower Court and therefore is subjudice on the ground that both applications are seeking preservative orders of the same suit land. Relying on the **Mukhisa Biscuit Manufacturing Co Limited Vs West End Distributors Ltd (1969) EA 696**, they maintain that the application is an abuse of the process of the Court.

#### **Is the application subjudice?**

7. The doctrine of subjudice is enshrined in Section 6 of the Civil Procedure Act it states 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. Explanation. —The pendency of a suit in a foreign Court shall not preclude a Court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign Court”.

8. I have perused the motion filed by the 1<sup>st</sup> Applicant in the lower Court and is expressed as thus;

“the Court be pleased to grant a temporary injunction restraining the Defendants whether by themselves their servants and or agents or anybody acting on their behalf from subdividing selling and or transferring to a third party sand or dealing with the title to the suit land in any manner whatsoever pending the hearing and determination of this application.

9. The Background of the Plaintiffs' case is that the Defendant is said to have entered the suit portion of the land which is set out as 14 acres and alleged to have been reserved as a dam .The Plaintiff's case against the Defendant is that they have attempted to subdivide the portion and even taken out proposed mutations for subdivision .That they have removed beacons on the ground and intend to sell the land to 3<sup>rd</sup> parties .That the Plaintiffs acquired the suit property through the Plaintiffs' shareholding in the Pundamilia Cooperative Society. Their case is that the society set aside the portions for school roads and social amenities and the suited portion for a dam. The Plaintiffs aver that their use of the dam was affected due to misuse and mismanagement by the Defendants who did not repair the wall. The temporary injunction therefore is being sought by the Plaintiff to restrain dealings and subdivision of the suit land pending the determination of the suit.

10. The Respondents have not presented the pleadings in Thika CMCC case however it is apparent that the Defendants are officials of the Cooperative Society that was sued in the lower Court case. It is pleaded that the lower Court matter is now at the execution stage.

11. The suit in the lower Court is between the 1<sup>st</sup> Applicant and Punda Milia Cooperative Society Limited. The subject matter of the motion in the lower Court and that of this Court is the same. The issues under consideration in the lower Court is the warrant of attachment of the suit land in settlement of a decree in favour of the 1<sup>st</sup> Plaintiff against Punda Milia Cooperative Society Limited while in this Court the issues relate to ownership of the suit land.

12. The Court does not find this application to fall within the rules of subjudice.

### **Is the objection a pure point of law?**

13. In order for a matter to be taken by the Court as a Preliminary Objection it must be guided by the definition of a Preliminary Objection as acknowledged in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

"..... 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".

14. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

“.....a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, 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. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

15. The effect of the case law cited above means for one to succeed in putting up a preliminary objection, it must meet the following criteria; it must be a pure point of law; it must be pleaded by one party and admitted by the other; it must be a matter of law which is capable of disposing the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

16. In this case, the Defendant's contention that there is a similar application pending at THIKA CMCC 3 / 2008 was disputed and required further proof of his allegation. The objection is one that calls upon the Court to investigate the subject matter, the impact of the application in the lower Court as to its orders. There is no evidence of a pure point of law and in my considered opinion the objection is blurred by factual details calling for evidence. The principles of granting a Preliminary Objection therefore are ousted.

17. As noted on the already settled jurisprudence on the issues at hand, it is trite that Courts have often discouraged the practice of taking out preliminary objections since they ultimately defeat the hearing of matters on merit and as well as consume time and costs which would otherwise be avoided. In fact such objections are deemed unnecessary and an improper practice as they occasion confusion on issues.

18. Further still, the preliminary objection has been brought to bar an application for interim injunction which orders are within the Courts unfettered jurisdiction to grant or dismiss .The objection fails on this ground that it cannot be raised on matters touching on exercise of discretion. Instead the Courts have been inclined to proceed with matters on merit unless the objection meets the threshold and assists in achieving the overriding objectives to determine the matters expeditiously and to save judicial time.

19. The Supreme Court recently in 2015 reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR;**

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis is mine]

20. In this case, the Defendant has failed the test.

### **Is the application an abuse of the process of the Court?**

21. Guided by my decision above the Court does not find the application as one falling under an abuse of the process of the Court.

22. In the end the Preliminary Objection is bereft of merit. It is dismissed with costs to the Applicants.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22<sup>ND</sup> DAY OF JULY 2019**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiffs/Applicants – Absent

Wachira HB for Wanjiru Theuri for the 1<sup>st</sup> – 5<sup>th</sup> Defendants/Respondents

Irene and Njeri, Court Assistants