



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 297 OF 2018**

**1. HAMADI MOHAMED HAJI**

**2. OMAR MOHAMED HAJI.....PLAINTIFFS**

**VERSUS**

**OMAR PAMBA.....1<sup>ST</sup> DEFENDANT**

**ALI BANK SHAMBI.....2<sup>ND</sup> DEFENDANT**

**RASHID KIBWANA.....3<sup>RD</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR KWALE COUNTY.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a preliminary objection dated 18<sup>th</sup> February 2019 by the 2<sup>nd</sup> defendant seeking to have the plaintiffs suit dismissed, withdrawn and or stayed with costs on the grounds that the present suit is an abuse of court process and the matter is sub-judice as Succession Cause No. 11 of 2016 at Kwale is still pending and thus offends and violates the provisions of Sections 6, 11, 12 (d) and 15 of the Civil Procedure Act.

2. In the plaint dated 17<sup>th</sup> December 2018 the Plaintiffs have brought this suit against the defendants seeking the following orders:

- a. A declaration that the Plaintiffs are the lawful and absolute owners of the parcels of land KWALE/NG'OMBENI/1664**
- b. An order of permanent injunction restraining the defendants by themselves, their servants, assigns, agents or any other person appointed by them from entering, remaining on, trespassing and/or dealing with in the manner the property interest of the plaintiff in KWALE/NG'OMBENI/1664.**
- c. General damages for trespass.**
- d. Costs of this suit.**
- e. Any other or further relief this Honourable Court may deem fit to grant.**

3. The Plaintiffs' claim is that at all material times herein the plaintiffs are the registered proprietors of the suit property. That the 1<sup>st</sup> Defendant runs an Islamic School known as Tahmeed Muslim School on PLOT NO. KWALE/NG'OMBENI/38 while the 2<sup>nd</sup> defendant resides on PLOT NO.KWALE/NG'OMBENI/1663 and that the 3<sup>rd</sup> and 4<sup>th</sup> defendants are the registered owners of PLOT NO.KWALE/NG'OMBENI/1662. The plaintiffs aver that the 1<sup>st</sup> defendant has trespassed and/or encroached on the plaintiffs property and erected a structure thereon and that they have been denied peaceful and quiet enjoyment of their property by the 1<sup>st</sup> to 4<sup>th</sup> defendants by reason of which they have suffered loss and damage. The plaintiffs aver that there is another suit in the Kadhi's Court in Kwale being **Succession Cause No.117 of 2016**. The Plaintiffs also filed the Notice of Motion dated 17<sup>th</sup> December, 2018 seeking orders of temporary injunction pending hearing and determination of the suit

4. The 1<sup>st</sup> defendant filed a statement of defence dated 21<sup>st</sup> February, 2019 in which he avers that the plaintiffs' suit is frivolous, vexatious and otherwise an abuse of the court process.

5. The Preliminary Objection was canvassed by way of written submissions which were duly filed by the advocates for the parties. I have considered the objections raised. In his ruling in the case of **Garden Square Ltd –v- Kogo & Another (2003)eKLR**, Ringera J (as he then was) stated that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the then Court of Appeal for East Africa in the case of **Mukisa Biscuits Manufacturing Ltd –v- West End Distributors Ltd (1969)EA 696** in which Sir Charles Newbold, the President of that court stated:

***“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all 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 improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The improper practice should stop.”***

6. The preliminary objection by the 2<sup>nd</sup> defendant is mainly that the suit is sub judice and also that it has been filed in the wrong court. I have perused the pleadings herein. In the plaint, the plaintiffs seek a declaration that they are the lawful owners of LAND PARCEL NO. KWALE/NG'OMBENI/1664 and an order of permanent injunction against the defendants as well as general damages for trespass. On the other hand, the 2<sup>nd</sup> defendant alleges that the matter is sub judice as Succession Cause No. 11 of 2016 at Kwale is still pending.

7. Section 6 of the Civil procedure Act provides 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, 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.”***

8. The jurisdiction of the Kadhis's courts is provided under Section 5 of the Kadhi's Court Act Cap II of the Laws of Kenya which provides as follows:

***“A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of question of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”***

9. It will be seen from the above provision of law that the jurisdiction of the Kadhi's Court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce and inheritance in which all the parties profess the Muslim religion. The dispute before this Court relates to ownership and trespass. That in my view, is squarely an issue that falls within the jurisdiction of this court and the Magistrate's Court within the necessary pecuniary jurisdiction. Since the dispute is over ownership and the use of the suit land, this court has jurisdiction to entertain it.

10. It has also been submitted that the suit violates the provisions of Section 11, 12 and 15 of the Civil Procedure Act on place of suit. The 2<sup>nd</sup> Defendant has submitted that the value of the suit property is less than Kshs.20 million, hence false within the jurisdiction of the Chief Magistrates' Court at Kwale. I note however, that the value of the suit property has not been disclosed in the pleadings. The 2<sup>nd</sup> defendant has only stated the value of less than Kshs.20,000,000.00 through submissions. Since the value of the suit property is not agreed and is a fact to be ascertained, I find that the objection in that regard cannot be sustained. As already stated, a Preliminary Objection should raise a pure point of law which is argued on the assumption that all acts pleaded by the other side are correct and it cannot be raised if any fact has to be ascertained.

11. The upshot of the above is that I find no merit in the preliminary objection. It is hereby dismissed with costs to the plaintiffs.

**DATED, SIGNED and DELIVERED at MOMBASA this 30<sup>th</sup> day of September 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mureithi holding brief for Ms. Okumu for plaintiffs

Mwinyi for 1<sup>st</sup> Defendant and holding brief for Koja for 2<sup>nd</sup> defendant

No appearance for 3<sup>rd</sup> & 4<sup>th</sup> defendants

Yumna Court Assistant

**C.K. YANO**

**JUDGE**