



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 126 OF 2016

EMATUNDU KAPER

RICHARDS ORPHANAGE.....PLAINTIFF

VERSUS

JUSTINE MUTOBERA

AMSO MTSOTSO ALIAS AMOS MUTSOTSO

MARTIN WANZALA NAFUKHO

THE DISTRICT LAND REGISTRAR,

KAKAMEGA

THE ATTORNEY GENERAL.....DEFENDANTS

RULING

The 1st and 3rd defendants raised preliminary objection on a point of law on the following grounds:-

- (i) That the suit is scandalous, frivolous or vexatious.
- (ii) That the suit is incompetent having been instituted in the name of a body lacking locus standing and by persons who are wanting in legality.
- (iii) That the plaintiff (Ematundu) does not exist as it was merged with Akhonya Trust children home hence incapable of instituting any legal suit.
- (iv) Ematundu Kasper Richards Orphanage is not a legal entity which can sue and be sued on its own name.
- (v) That the person deponed in the verifying affidavit has no authority as no seal for Ematundu was affixed as required by law.
- (vi) That the instant suit is res judicata to Butere PMCC No. 31 of 2010 which was heard and determined in favour of the 1st and 3rd defendants. (hereto marked J.M. -1 in the Butere Order)

The respondents submitted that they are members of a community and have brought this case in the interest of the entire community. The Trustees are the ones to be blamed hence they cannot bring the suit. That this matter is not res judicata and the parties in the Butere Court are different.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... 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”

In the same case, Sir Charles Newbold said:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of *Oraro vs. Mbajja* [2005] e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the 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 preliminary objection, and 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. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised as a Preliminary Objection. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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 respondent submitted, the matter herein is res judicata because this honourable court has already made a decision in Butere PMCC No. 31 of 2010 which was heard and determined in favour of the 1st and 3rd defendants. (hereto marked J.M. -1 in the Butere Order). I have perused that said order and find that the parties are similar and so is the subject matter. From the documentary evidence on record the plaintiff (Ematundu) does not exist as it was merged with Akhonya Trust children home hence incapable of instituting any legal suit. I find that, Ematundu Kasper Richards Orphanage is not a legal entity which can sue and be sued on its own name. the respondent submit that the defendants are suing as members of the community. Order 1 rule 8 of the Civil Procedure Rules provides that;

“One person may sue or defend on behalf of all in same interest.

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such cases give a notice of the suit to all such persons either by personal service, or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to Court to be make a party to such suit.”

In the case of *Al Mhala Swaleh & 4 others v Mohammmed M. Sheikh Ali & 12 others* [2017] eKLR, the court held that;

“I think however that a reading of Order 1 Rule 8 above indicates that a party may file such proceedings but may not proceed therewith without the leave of the Court. It is however imperative as stated by Counsel that notice of the said proceedings be given to all other parties. Such notice is meant to ensure all parties are notified of the institution of the suit and to avoid the situation of repeated litigation by other parties.

26. The suit is brought on behalf of Tuamkeni Self Help Group. This is not a body with legal capacity to sue and/or to be sued and it is important that all those interested in this suit be individually known and that they apply to be made party as per the provisions of Order 1 Rule 8(3) aforesaid”.

The community members ought to follow the said laid down procedure in Order 1 rule 8 of the Civil Procedure Rules. The plaintiff (Ematundu) does not exist as it was merged with Akhonya Trust children home hence incapable of instituting any legal suit. I find that, Ematundu Kasper Richards Orphanage is not a legal entity which can sue and be sued on its own name. I find the preliminary objection has

merit and I uphold the same. This suit is struck off with costs to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE