



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO.38 OF 2018(O.S)

IN THE MATTER OF ORDER 37 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF DEMARCATION OF BOUNDARIES OF LAND TITLE NUMBER KARAI/KARAI/5104,5105,5106 AND 5107

AND

IN THE MATTER OF IDENTIFYING AND REPLACING THE BEACONS OF THE ORIGINAL LAND TITLE NUMBER KARAI/KARAI/97 AS PER THE ORIGINAL GREEN CARD BEFORE THE SAID PARCEL OF THE LAND WAS SUBDIVIDED TO LAND TITLE NUMBER KARAI/KARAI/484,485 AND 486

MARGARET NYIHA GATAMBIA.....1ST PLAINTIFF/APPLICANT

DAVID KIMANI GATAMBIA.....2ND PLAINTIFF/APPLICANT

DANIEL MBUTHIA GATAMBIA.....3RD PLAINTIFF/APPLICANT

(all suing as the administrators of the

Estate of GATAMBIA NGURE-Deceased)

VERSUS

PENINAH NGECHI NJAAGA.....1ST DEFENDANT/RESPONDENT/OBJECTOR

(Being sued as the administrator

of the Estate of NJAAGA KAHIU)

HANNAH NYAMUNYA NJENGA.....2ND DEFENDANT/RESPONDENT

(Being sued as the administrator of the

Estate of NJENGA MUCHIRI)

DISTRICT LAND REGISTRAR, KIAMBU.....3RD DEFENDANT/RESPONDENT

KIAMBU DISTRICT LAND SURVEYOR.....4TH DEFENDANT/ RESPONDENT

RULING

The matter for determination is the **Notice of Preliminary Objection** dated **29th March 2018**, filed by the 1st Defendant/ Respondent on the grounds that;

1. A Ruling was made and a decree issued on 30th March 2012 in Land Case No.2 of 2009, before the Principal Magistrates Court in Kikuyu, ordering the District Surveyor to visit the subject property and rectify boundaries of land parcel Karai/Karai/484 which ruling has not been set aside on appeal or review. The entire suit herein is res judicata for contravention of the provisions of Section 7 and 34 of the Civil Procedure Act, Cap 21 Laws of Kenya
2. The suit filed herein are time barred and are in contravention of Sections 7 and 8 of the Limitation of Actions Act Cap 22 Laws of Kenya.
3. The Plaintiffs pleadings are based on an incurable illegality and ought to be struck out.
4. The documents filed were drawn and signed and filed by unqualified person in contravention of Section 9 of the Advocates Act Cap 16 Laws of Kenya
5. The entire suit and all proceedings taken against the 1st Defendant including the application date 2nd day of January 2018 are a nullity ab initio.
6. The Plaintiffs suit and application herein are therefore incurably defective bad in law and ought to be struck out.

The Plaintiffs/Applicants were duly served and despite service, they did not file any documents. The Court directed the parties to file written submissions and in compliance with the said directive, the 1st Defendant through the **Law Firm of C.N Kinyanjui & Co. Advocates** filed the written submissions on **7th March 2019**, and relied on various decided cases and provisions of law to which the Court has now carefully read and considered.

The Court has also carefully read and considered the pleadings of the parties the annexures thereto together with the written submissions and renders itself as follows:-

The guiding law on the issue of *res judicata* is **Section 7 of the Civil Procedure Act** which 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”.

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing 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 Sir **Charles Nebbold, JA** stated that:-

“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. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

This Court having made a finding on the description of a **Preliminary Objection**, it is not in doubt that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

Further, in the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, 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 this Court’s opinion that in determining a **Preliminary Objection**, the Court will also take into account that the **Preliminary Objection** must stem from the pleadings and raise pure point of law. 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.”

Before the Court embarks on determining the merit of the **Notice of Preliminary Objection**, it has to first determine whether what has been raised herein satisfy the ingredients of a **Preliminary Objection**. As the Court determines whether what the 1st Respondent has filed amounts

to a Preliminary Objection or not, the Court will also be persuaded by the findings in the case of Oraro...Vs...Mbaja(2005) 1KLR 141, where the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

In the instant **Preliminary Objection**, the 1st Defendant/Respondent has averred that the Originating Summons herein is **Resjudicata** as the issues raised in the instant suit were the same facts which were raised and canvassed in **Land Case No.2 of 2009**, at **Kikuyu Law Courts**, wherein a **Decree** was made and an order issued requiring the District Surveyor to visit the subject property and rectify boundaries. Further that the pleadings were drawn by an unqualified person and therefore based on an incurable illegality and ought to be struck out. The Plaintiffs/Applicants did not oppose the **Preliminary Objection**. However the Court has an obligation to interrogate the evidence placed before it and make a determination.

For the Court to determine whether the issues herein were directly and substantially in issue in the said Land case and further determine whether the pleadings were drawn by an unqualified person, the Court will have to ascertain facts by having to call for the said proceedings and pleadings of the **Land Case No.2 Of 2009** before the Principal Magistrates Court in Kikuyu and scrutinize the same. *The Court will also have to ascertain whether the Counsel who drew the pleadings was qualified or not by calling for documentation to prove the same.*

Further this **Preliminary Objection** as raised does not stem from the pleadings but it requires the Court to call for ascertainment of facts. Though **Section 7** of the **Civil Procedure Act** deal with the issue of *Resjudicata*, it is evident that the said issue of *Resjudicata* cannot be raised in a Preliminary Objection. As was held in the case of George Kama Kimani & 4 Others ...Vs...County Government of Trans-Nzoia (supra) the best way to raise the issue of *res judicata* is by way of **Notice of Motion** where pleadings would be annexed to allow the Court consider whether the issues in the previous suit are similar to the issues in the suit being in issue. Further the issue as to whether or not the pleadings were drawn by an unqualified person also has to call for ascertainment of facts for this Court to come into a conclusion.

Given the limited scope of the jurisdiction on **Preliminary Objection** and the test to be applied, the Court finds that an issue of *resjudicata*, involves probing of evidence and therefore the same cannot be determined via a **Preliminary Objection**. Further the Court also finds that the issue of whether or not the documents were drawn by an unqualified person in contravention of **Section 9** of the **Advocates Act** requires this Court to probe evidence.

This Court finds that given the description of Preliminary Objection in the Mukisa Biscuits case (supra) and given that an issue of *res judicata* involves ascertaining of facts, then this instant **Notice of Preliminary Objection** as raised by the 1st Respondent does not meet the test of what amounts to a **Preliminary Objection**. It does not raise pure points of law and it cannot be determined without ascertainment of facts from elsewhere.

Therefore, this Court finds and holds that the **Notice of Preliminary Objection** as filed by the 1st Respondent is not a Preliminary Objection as per the Mukisa Biscuits case (supra). For the above reasons the said **Notice of Preliminary Objection** is accordingly dismissed entirely with costs being in the cause. Let the matter be set down for hearing and be determined on merit.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of November, 2019.

L. GACHERU

JUDGE

8/11/2019

In the presence of

No appearance for Plaintiffs/Applicants

Mr. Angaya holding brief for Mrs. Kithika for 1st Defendant/Objector

No appearance for 2nd Defendant

No appearance for 3rd Defendant

No appearance for 4th Defendant

Lucy - Court Assistant

L. GACHERU

JUDGE

8/11/2019