



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 94 OF 2019

WILSON KIARIE KIMANI (Suing as the

personal Legal Representative of MARGARET

WANGUI KIMANI.....PLAINTIFF/APPLICANT

VERSUS

ABERDARE INVESTMENT LIMITED.....1ST DEFENDANT/RESPONDENT

THIKA LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

THIKA DISTRICT SURVEYOR.....3RD DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

RULING

The Plaintiff herein filed this suit vide **Plaint** dated **22nd May 2019**, seeking for orders for a Declaration that his mother is the absolute owner of **Thika Municipality Block 6/1086**, and further that the 1st Defendant be restrained from interfering with the suit land.

The 1st Defendant filed a **Preliminary Object** dated **10th June 2019**, and averred that the Plaintiff's claim against the 1st Defendant is **Res Judicata** to the claim in the High Court at Nairobi **E.L.C Case No. 342 of 2013**, and thus the Honourable Court has no jurisdiction to hear and entertain the suit which has already been heard and determined by a Court with competent concurrent jurisdiction. Further that the Plaintiff's claim against the 1st Defendant is a claim that is pending before the Court of Appeal in Nairobi in **C.A No. 279 of 2018**, and therefore the instant claim is bad in law, fatally defective and incurable by amendment and that the suit is a non starter and amounts to abuse of the Court process.

It was further contended that the High Court in Nairobi in **ELC No. 342 of 2013**, ordered the Plaintiff to deposit in Court a sum of **Kshs. 10,000,000/=** as security for costs prior to his claim being heard, but he instead filed another suit in this Court.

The 2nd, 3rd and 4th Defendants also filed a Notice of Preliminary Objection on the grounds that that the suit as filed is **Res judicata** and contrary to section 7 of the **Civil Procedure Act**, further that the mandatory provisions of **Section 13 A** of the **Government Proceedings Act** was violated, that the suit is bad in law, vexatious and an abuse of the Court process and therefore the Court lacks jurisdiction to entertain it.

The **Preliminary Objections** are opposed and the Plaintiff filed a **Replying Affidavit** sworn on the **1st of July 2018**, and averred that he has been advised by his Advocate that for a matter to be deduced as **Res Judicata**, the same should have been heard and determined by a competent Court. He affirmed that there is a suit being **ELC No.342 of 2013**, in **Milimani ELC** in which he is not a litigating party. That further the suit therein has not been determined and the cause of action in the said suit is different from the instant suit as the parcels of land are different. That the suit property in **ELC 342 of 2013** is **L.R No.4953/2157**, whereas the suit property in the instant suit is **Thika Municipality Block 6/186**, both within Thika Municipality and that what is pending before the Court in **Civil Appeal No.279 of 2018**, is an Appeal on the Ruling of **Hon. Justice E.Obaga**, dated **13th June 2018**. He averred that he is only an Interested Party in **ELC 342 of 2013**, and the issue in the said suit is between the 1st Defendant who is the Plaintiff in the Nairobi suit wherein he seeks to evict 30 Defendants from his land **L.R No.4953/2157**. It was his contention that this suit has a different cause of action.

The **Preliminary Objections** were canvassed by way of written submissions and the 2nd, 3rd and 4th Defendants through **Ruth Kerubo State Counsel** submitted that the issues for determination in this matter touch on issues already determined in **Milimani ELC No.342 of 2013**, and that the suit offends **Section 13A (1)** of the **Government Proceedings Act** as the Section requires a notice of intention to sue

Government to be served upon the Hon. Attorney General. It was therefore submitted that the Plaintiff is not entitled to costs against the said Respondents as the suit is **Res Judicata** and should be dismissed.

The Plaintiff through the **Law Firm of Kanyi Kiruchi & Company Advocates**, filed their submissions on the **1st of October 2019**, and submitted that the matter herein fails the test of being declared **Res judicata**, as the subject matters of the suit are different and that **Nairobi ELC No.342 of 2013**, has not been determined. It was further submitted that failure to comply with **Section 13A(1) of Government Proceedings Act**, is not a bar to deprive an intending litigant his cause of action. The Plaintiff relied on various provisions of law and decided cases and submitted that the **Preliminary Objections** were baseless and the Court was therefore urged to dismiss the same.

The **1st Defendant** through the **Law Firm of Ondabu & Company Advocates** filed its submissions on the **27th of August 2019**, and submitted that the issue raised in the present suit is the same as the one between the parties in **ELC 342 of 2013**, filed in Nairobi and that the entire suit offends **Section 7** of the **Civil Procedure Act** and it is therefore an abuse of the Court process.

The Court has 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”.

The above being 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 holding that in determining a **Preliminary Objection**, the Court will also take into account that the **Preliminary Objection** must stem from the pleadings and should 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 Objections**, 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 Respondents have 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 Objections**, the Respondents have averred that the suit herein is **Res judicata** as the issues raised in the instant suit were the same issues which were raised and canvassed in **ELC 342 of 2013**. Further that the **2nd, 3rd and 4th Defendants** have also averred that the suit is in violation of **Section 13 A** of the **Government Proceedings Act**.

For the court to determine whether the issues herein were directly and substantially in issue in the said ELC case at Milimani and further determine whether the suit is in contravention of the requirements of **Section 13A** of the **Government Proceedings Act**, the Court will have to ascertain facts by having to call for the said proceedings and pleadings of the **ELC No.342 of 2013, pending before Milimani ELC** and scrutinize the same. *The Court would also have to ascertain whether the Plaintiffs complied with the requirements under the **Government Proceedings Act***

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 **Res judicata**, it is evident that the said issue of **Res judicata** 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 (2014) eKLR*, 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.

Given the limited scope of the jurisdiction on **Preliminary Objection** and the test to be applied, the Court finds that an issue of **Res judicata**, 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 suit contravenes the requirements under the **Government Proceedings Act** requires this Court to probe evidence.

Therefore, 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 Objections** as raised by the Respondents do not meet the test of what amounts to a **Preliminary Objection**. They do not raise pure points of law and cannot be determined without ascertainment of facts from elsewhere.

Consequently, the Court finds and holds that the **Notice of Preliminary Objections** as filed by the Defendants are not Preliminary Objections as per the *Mukisa Biscuits case (supra)*. For the above reasons, the said **Notice of Preliminary Objections** are accordingly dismissed entirely with costs to the Plaintiff. Let the matter be set down for hearing and be determined on merit.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of December 2019.

L. GACHERU

JUDGE

19/12/2019

In the presence of

M/S Mwangi holding brief for Mr. Kanyi for Plaintiff/Applicant

Mr. Ondabu for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

No appearance for 4th Defendant/Respondent

Lucy - Court Assistant.

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

19/12/2019