



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERICHO
ELC CASE NO. 60 OF 2015
BENEDETA CHERUTO MABWAI.....PLAINTIFF
VERSUS
WILLIAM RONO (Sued on behalf of the
estate of DAVID KIPNEGENO RONO)
AND
JANE CHEPWOGEN KIMETO.....DEFENDANTS
RULING

Introduction

1. This Ruling determines the defendant's Preliminary Objection (P.O) dated 13th March 2018 in which the defendant raised the following points:

1. That the Plaintiff's application dated 18th December 2015 and the suit dated 27th November 2015 are fatally defective and misplaced and therefore an abuse of the court process.
2. That the subject matter herein is res judicata in that the same was determined before the lower court being Sotik Land Disputes Tribunal Case No. 13 of 2010 whereby the court adopted the award of the Land Disputes Tribunal Case No. 13 of 2010 whereby the court adopted the award of the Land Disputes Tribunal on the 12th August 2010 and subsequently a decree was issued.
3. That the Plaintiff/Applicant did not challenge the said decision by filing an application for Judicial Review before the High Court for determination of the lower court's decision.
4. That the Plaintiff/ Applicant therefore cannot challenge the judgment of the lower court by way of a Plaint as the applicant is time barred to challenge the same under the rules of Judicial Review and therefore it has been overtaken by events
5. That the Plaintiff's application and suit lack merit both in facts and law.
6. That the defendant/respondent prays that the plaintiff's application and suit be dismissed with costs.

2. It was agreed that the Preliminary objection be canvassed by way of written submissions and each party filed their submissions.

Defendant's Submissions

3. In his submissions learned counsel for the Defendant argues that the plaintiff's application is fatally defective and lacking in merit as the Land Disputes Tribunal determined the case in the defendant's favour by ruling that land parcel no. KERICHO/KIPSONOI/ S.S /513 measuring 5.5 acres be transferred to the defendant.

4. He submits that since the plaintiff has not appealed against the said decree and judgment, the defendant is the legal owner of the suit land yet the plaintiff has refused to transfer the same to the defendant. He further submits that the plaintiff did not appeal against the decision of the Land Disputes Tribunal which was subsequently adopted as the judgment of the court on 12th August 2010. He argues that before filing the instant suit, the Plaintiff filed a similar application in the lower court which he has failed to prosecute. He therefore submits that the Plaintiff's suit is res judicata and this court has no jurisdiction to hear it.

Plaintiff's Submissions

5. In his response learned counsel for the Plaintiff raises three main issues:

First, he argues that the P.O is premature as the Defendant has not yet filed his defence and in terms of Order 2 Rule 4 (1) of the Civil Procedure Rules, the defendant is precluded from raising a P.O as the same is not anchored on any pleading. He relies on the cases of **Agnes Mukami and 5 Others V Ngewaji Co. Ltd 2005 KLR and Stephen Onyango Achola & Another V Edward Hongo Sule & Another 2004 KLR.**

6. Secondly, he argues that a P.O must be on points of law and does not require intense investigation by the court or evidence to be tendered.

7. He cites the case of **Oraro V Mbaja 2005 1KLR 141** where Ojwang J (as he then was) citing with approval the case of **Mukisa Biscuit Manufacturing Company Limited V West End Distributors Ltd (1969) E.A 696** stated that:

“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 raised as a preliminary point may dispose of the whole suit”

8. Thirdly, he argues that the Plaintiff appealed the decision of the Land Disputes Tribunal vide Provincial Appeal Case No. 13 of 2010. He states the appeal was still pending at the time the Land Disputes Tribunal Act of 1990 was repealed and therefore by dint of section 30 of the Environment and Land Act, the plaintiff was at liberty to institute the instant suit in the ELC. He therefore maintains that the suit is not res judicata.

Issues for Determination

9. I have considered the rival submissions of counsel and what stands out for determination is whether the points raised by the defendant fall within the definition of a preliminary objection.

Analysis and Determination

10. As correctly submitted by counsel for the plaintiff the defendant's P.O does not fit within the definition of preliminary objection. The case of **Mukisa Biscuit Manufacturing Company Limited V West End Distributors Ltd (1969) E.A 696** defined a preliminary objection as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

Justice Newbold in the said suit argues 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”

Furthermore, in **Oraro V Mbaja (supra)** Ojwang J observed as follows:

“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 process 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. I am in agreement that where the court needs to investigate facts, a matter cannot be raised as a preliminary objection”

11. In the instant suit the defendant has raised several points which will require evidence to authenticate what the defendant has alleged. For instance, whereas the defendant alleges the award of the Land Disputes Tribunal was adopted as a judgment of the court, the plaintiff alleges that he appealed against the said award at the Provincial Appeals Tribunal, and that the case was still pending by the time the Land Disputes Tribunal Act of 1990 was repealed. This will require both parties to adduce evidence so that the court can arrive at the truth.

12. Accordingly, I dismiss the Preliminary Objection with no order as to costs.

13. I direct that the application dated 8th December 2015 be fixed for hearing.

Dated, Signed and Delivered at Kericho this 18th day of April 2018

J.M ONYANGO

JUDGE

In the presence of:

Mr Bii for the Defendant

Mr J.K Rono for the Plaintiff

Court Assistant: Rotich