



**Mbutu alias Mbutu Munene v Gicigo (Environment & Land Case
E013 of 2022) [2024] KEELC 1615 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 1615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E013 OF 2022
A KANIARU, J
JANUARY 30, 2024**

BETWEEN

MICHAEL MUNENE MBUTU ALIAS MBUTU MUNENE PLAINTIFF

AND

IRENE WANJIRU GICIGO DEFENDANT

RULING

1. This is a ruling on a Preliminary objection dated 19.05.2023 and filed on 23.05.2023. The objection has been brought by the Defendant – Irene Wanjiru Gicigo - and it is premised on the following five (5) points:
 - i. The plaintiff filed a suit at Wanguru Law Courts on the subject vide ELC No. 22 of 2020 as per the plaint attached.
 - ii. The suit aforesaid, upon my objection was struck out and the plaintiff therein as herein was ordered to enjoin himself in the ELC case at Embu as a person with interest as in the proceedings and ruling attached.
 - iii. By an amended petition the plaintiff was included as a respondent in the ELC No 6 of 2018 at Embu, and seemingly has been avoiding service. In the petition the plaintiff is the respondent no. 42 as one of those who were irregularly allocated and issued with title deed for my land No. 383 as in the petition attached.
 - iv. The instant suit by the plaintiff is a duplicity of the suit in ELC Petition No. 6 of 2018 in which he is evidently the respondent no. 42.
 - v. In the petition ELC No. 6 of 2018, I feature as petitioner No. 132 as is my land parcel 383 at pages 5 and 14 respectively.



The Defendant further seeks for the dismissal of the plaintiff's suit for being unprocedurally filed and for being duplicitous of ELC Petition 6 of 2018. She would wish to get costs too.

2. The Preliminary objection was canvassed via written submissions. The Defendants submissions were filed on 25.08.2023 and the Plaintiff's submissions were filed on 16.10.2023.
3. The defendant gave a background to the Preliminary objection and submitted that the plaintiff, by a suit filed as ELC No. 22 of 2020 at Wanguru Law Courts, sought to evict the defendant from her land; that because there was a High Court case at Embu, being ELC Petition No. 6 of 2018, the trial magistrate struck out the suit and directed the plaintiff be joined in the petition and therein seek his interest in the suit land; that the plaintiff did not heed the trial magistrates directions and instead filed this suit; that the plaintiff ought to pursue his rights through the aforesaid petition, hence this suit should be dismissed for being a duplicity of Petition No 6 of 2018.
4. The Plaintiff on the other hand submitted that the suit herein is partly heard as the plaintiff and defendant have testified; that the defendant was stood down by the court on its own motion during defence testimony to enable her file comprehensive documents; that instead the defendant filed the preliminary objection herein; that the plaintiff is not aware of High Court ELC Case No. 6 of 2018 – Embu, and has never been served with the pleadings thereof; that in the trial court's ruling the plaintiff was directed to ventilate his case before the ELC Court at Embu or move that court to be joined as a party or person with interest; that it is on this basis that the plaintiff filed his case on this forum; that the defendant has not quoted any legal provision to warrant or support the preliminary objection as what has been raised are purely matters of fact; that the defendant ought to have filed a formal application instead; he urges that the said preliminary objection be dismissed with costs.
5. To support her case she cites the cases of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* (2022) eKLR which cited the case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969)(696), *Samuel Waweru v Geoffrey Muboro Mwangi* (2014) eKLR.
6. I have considered the preliminary objection as well as the rival submissions. The issue for determination is whether the preliminary objection meets the fundamental threshold and whether it is merited.
7. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

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

The effect of a preliminary objection if upheld, renders any further proceedings before the court redundant or unnecessary. Thus a preliminary objection may only be raised on a point of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record. A contention as to facts nullifies the validity of an objection.

8. From the foregoing provisions, it is apparent that in order for a preliminary objection to hold, it must be demonstrated by the party bringing it that there is no contest as to the facts; and that the preliminary objection has been raised on a point or points of law only.



9. The defendant in her preliminary objection is claiming that the suit herein is a duplicate of another suit being Petition No. 6 of 2018. The plaintiff on the other hand denies the said facts as he says he is unaware of the said Petition as he has not been served. The Defendant also attaches a copy of the said petition as well as proceedings and a ruling in a case which is said to have been similar to this one. The plaintiff's case was dismissed. It is not in doubt that in order to determine whether the suit herein is a duplicate of the said Petition No. 6 of 2018, the court will have to probe the pleadings and accompanying documents to be able to ascertain whether the said matter is a duplicate of this one. In doing so, the court will be probing evidence and this goes beyond the scope of a preliminary objection.
10. The court in the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* (2014) eKLR as cited in *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling) observed that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

11. In addition to the above, the law under Section 6 of the *Civil Procedure Act* provides as follows;
Stay of suit

“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 claim, 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.”

12. I wish to associate myself with the observations of the court in the case of *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling) where it was held that;

“I note that although this ground raises a pure point of law, its effect would not result in the dismissal of the claim but it would merely result in an order staying the latter suit pending the determination of the suit that was the first to be filed. In view of the foregoing, I find that strictly speaking, this ground is not a proper ground to be raised in a Preliminary Objection.

The thrust of section 6 of *civil procedure Rules* is that where a suit similar to a pending suit is filed, the suit filed is stayed. A preliminary objection is not about staying of suits; it is about dismissing or striking them out. What is before this court therefore can not be said to be a proper preliminary objection.

13. Since a preliminary objection cannot be raised and sustained if any fact has to be ascertained or where the allegation is that there is another pending suit, I find that the Preliminary Objection dated 19.05.2023 lacks merit and I hereby dismiss it with costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF JANUARY, 2024.

In the presence of plaintiff, defendant and Court Assistant – Leadys



A.K. KANIARU

JUDGE

30.01.2024

