



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 154 OF 2017

CONSOLINE ATIENO ONONIA.....PLAINTIFF

VERSUS

SAMWEL MULERA LUKIRI.....DEFENDANT

R U L I N G

1. This ruling relates to the Preliminary Objection argued before me a few minutes ago which is based on a Notice to raise it dated 17/5/2018 filed in court on 18/5/2018. The premise of the objection is two-fold viz:

1. 1(1) That the Plaintiff has failed to show clearly which suit he is pursuing against the Defendant as there exists:

(a) CMCC No. 331 of 2015

CONSOLINE ATIENO ONONIA Vs SAMUEL MULERA LUKIRI

(b) HCC MISC APPL. NO. 22 OF 2017

CONSOLINE ATIENO ONONIA Vs SAMUEL MULERA LUKIRI

(c) ELC NO. 154 OF 2017

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(2) That the Defendant ceased to have powers over the suit after the demise of MUSA OUNDO MUSALAMA who had given the Defendant Power of Attorney to oversee legal issues to L.R. NO. SAMIA/LUCHULULO-BUKHULUNGU/1596 upon the death of the said MUSA OUNDO MUSALAMA on 25/12/2011.

2. In an unusual mode of response (unusual because it should have been argued or canvassed by way of written submissions) to the preliminary objection, the Plaintiff filed replying affidavit on 18/6/2018 and the Defendant, probably not to be outdone or possibly to even scores, filed a further affidavit on 2/7/2018.

3. What followed thereafter are rival arguments made before me today (24/7/2018). I have considered the points raised in the notice, the depositions filed, and the rival arguments. I need to point out that the Defendant filed a defence and contested all the material aspects of the Plaintiff's claim.

4. What is before me is not a proper preliminary objection. The Defendant should first have raised the issue in his defence and in the same defence he ought to have expressed intention to raise a preliminary objection. He should thereafter have filed a notice of preliminary objection like the one he filed. The omission to raise the issue in the defence was serious. It is in the defence where the suit is responded to. It is always important that an issue intended to be raised as a preliminary objection be first raised in the defence as an attack to the suit. When raised that way, it becomes contextualized in the pleadings.

5. The objection also fails to meet another crucial criteria namely: It should be based on a pure point of law. In **MUIRURI Vs KIMEMIA [2002] 2 KLR 677**, a preliminary objection was expressed to be in the nature of a demurrer in that it raises a pure point of law. The pure point of law is argued on the assumption that all facts pleaded by the other side are correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

6. In this matter, the Defendant has disputed all the material aspects of the Plaintiff's pleadings. No crucial fact is admitted as correct. And during hearing of the objection here, the court is being referred to documents whose contents are clearly contested. Quite clearly, the objection as raised here is a misguided adventure by the Defendant. The court cannot uphold it and the same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Busia this 24th day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Court Clerk: Nelson Odame

Plaintiff: Present

Defendant: Present

Fwaya for Plaintiff

Defendant in person

COURT: Ruling on Preliminary Objection raised here today read and delivered in open court. Right of Appeal – 30 days.

A. K. KANIARU

JUDGE