



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 147 OF 2014 (OS)**

**LYDIA KARIMI ..... PLAINTIFF**

**-VS-**

**CHRISTINE MUKIRI ..... DEFENDANT**

**RULING**

1. The plaintiff filed this suit against the defendant on 24<sup>th</sup> September 2014, by way of an Originating Summons seeking inter alia determination as to whether she lives on L.R NO. Nkuene/Taita /2772 as a devisee and heir of the Estate of the Late Sebastian Mbwiri Kiene. Contemporaneous with the Originating Summons, the plaintiff filled a Notice of Motion application seeking inter alia an order to restrain the Respondent, her agents, servants and/or employees or whomsoever else acting on her behalf or instructions from distressing for rent, evicting, disposing, trespassing into and/or in any other manner whatsoever dealing or interfering with the Applicant's possession, occupation and use of L.R NO. Nkuene/Taita/2772 and all the houses being and standing on the said land.

2. By a Notice of Preliminary Objection filed in court on 30<sup>th</sup> September 2014, the defendant has contended that the issue for distress of rent and/or eviction for nonpayment of rent could only be adjudicated before the relevant tribunal and that since the suit property was registered in the name of the defendant, the orders sought in the application were unconstitutional as the same would infringe on the proprietary rights of the respondent, and that further the application dated 24<sup>th</sup> September 2014, was an abuse of the court process as the same was *res judicata*, the applicant having lost a similar application on 24<sup>th</sup> September 2014, in Meru High Court Succession Cause no. 409 of 2007, on the same date the instant application was filed.

3. When the matter came up for hearing on 20<sup>th</sup> June 2018, the court directed the Preliminary Objection be heard by way of written submissions. Only defence side complied with the aforementioned court's orders of 20/6/2018.

4. Briefly, it was submitted for the defendant that this court lacked jurisdiction to entertain the application dated 24<sup>th</sup> September 2014 and the main suit on issues of distress for rent, eviction from the premises for nonpayment of rent and lifting of proclamation of the household properties since determination of such issues was in the purview of the Rent Restriction Tribunal and without jurisdiction, the court should down its tools and strike out the suit. It was further submitted that the application dated 24<sup>th</sup> September 2014, was *res judicata* as a similar application dated 10<sup>th</sup> September 2013, had been filed by the plaintiff vide Meru Succession Cause No. 409 of 2007, over the same subject matter, same parties and the same alleged cause of action which application was dismissed on 24<sup>th</sup> September 2014. Consequently the defendant urged the court to uphold the Notice of Preliminary Objection and strike out the entire suit with costs to the defendants.

5. I have carefully considered the Preliminary Objection and the submissions advanced herein. The law on Preliminary Objections is now well settled. It is now established that the proper practice is to determine the Preliminary Objections first especially where such Preliminary Objections are likely to dispose of the suit or application entirely. The case of **Mukisa Biscuits Manufacturing Co. Ltd vs West end Distributors Ltd (1969) EA 696** is instructive in this regard Per

Law JA that:

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

Sir Charles Newbold P. on the other had held that:

***“A preliminary objection is in the nature of what used to be 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.”***

6. J.B Ojwang J. as he then was succinctly put it thus in the case of Oraro vs Mbaja (2005) eKLR:

***“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is 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 processes of evidence. Any assertion which claims to be a preliminary objection, and 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 a court needs to investigate facts, a matter cannot be raised as a preliminary point.*”**

7. In the instant case the plaintiff seeks a determination as to whether inter alia she lives on L.R NO. Nkuene/Taita/2772 as devisee of heir of the Estate of the late Sebastian Mbwiri. In the application dated 24<sup>th</sup> September 2014, she seeks inter alia an order to restrain the Defendant and her agents, from distressing for rent, evicting, disposing, trespassing into and/or in any other manner whatsoever dealing and/or interfering with her possession, occupation and use of L.R No. Nkuene/Taita/ 2772.

8. The defendant on the other hand contended that this court was not seized of jurisdiction to handle the matter and that the same was the preserve of the Rent Restriction Tribunal.

9. The preamble to the Rent Restriction Act provides as follows:

***An Act of Parliament to make provision for restricting the increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling-houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling-house***

10. It is evident that the matters that the plaintiff is raising in the application dated 24<sup>th</sup> September fall squarely within the jurisdiction of Rent Restriction Tribunal established under Section 4 of the Rent Restriction Act. In The owners of motor vessel “Lillian S” vs. Caltex Oil Kenya limited (1989) 1 KLR 1, the Court of Appeal stated as follows: -

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a “court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.*”**

11. In JOHN KIPNG’ENO KOECH AND 2 OTHERS vs. NAKURU COUNTY ASSEMBLY AND 5 OTHERS [2013] eKLR Emukule, J had this to say on jurisdiction -

***“Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.”***

12. A perusal of the annexures to the Preliminary Objection reveals that indeed plaintiff herein had filed an application dated 10/9/2013 in Meru H.C.C.C NO. 409 of 2007, where she was raising similar issues as the ones in the application of 24.9.2014. The present suit was apparently filed when plaintiff’s application in the succession cause was dismissed. I am in agreement with Defence submissions that plaintiff ought to have lodged an appeal instead of bringing forth a similar application. The application of 24.9.2014 is hence Res-Judicata.

13. Further, in the Originating Summons filed on 24/9/2014, plaintiff is basing her claim on the notion that she is an heir to the **Estate** of one **Sebastian Mbwiri Kiene**. The determination of such an issue falls squarely under the ambit of a succession court. A succession cause was indeed filed in **Meru No. 409 of 2007**, where plaintiff herein was a party as an applicant. The filing of this suit along with the application is hence an abuse of the court’s process.

14. Taking into totality all the circumstances of this case and having come to the conclusion that this court is not properly seized with the jurisdiction to handle the matters that are being raised by the plaintiff, this court has no option but to down its tools.

#### **Final Orders**

15. Accordingly, I do find and hold that the notice of Preliminary Objection filled in court on 30<sup>th</sup> September 2014 is merited. This Suit and the Notice of Motion Application dated 24<sup>th</sup> September 2014 are accordingly struck out with costs to the defendant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 26<sup>TH</sup> SEPTEMBER, 2018 IN THE PRESENCE OF:-**

C/A: Janet/Galgalo

C.P Mbaabu for defendant

Macharia holding brief for Mwirigi for plaintiff

Defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**