



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 414 OF 2017

SUSAN NDUNGE MAINGI.....PLAINTIFF

VERSUS

MAINGI MUKEKA TUTO.....1ST DEFENDANT

GEORGE KARIUKI.....2ND DEFENDANT

JOHN GITHIRWA MAINA.....3RD DEFENDANT

PADDY KAMAU NG'ANG'A4TH DEFENDANT

DEPUTY LAND REGISTRAR, MACHAKOS.....5TH DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Preliminary Objection dated 20th November, 2017 and filed by the 2nd, 3rd and 4th Defendants. In the said Notice of Preliminary Objection, the Defendants have averred that the current suit is *res judicata*; that this court lacks jurisdiction to hear the suit because it raises matrimonial property issues and that the suit is frivolous, vexatious and an abuse of the court process. The Preliminary Objection proceeded by way of written submissions.
2. The Defendants' advocate submitted that the Plaintiff herein sued the 1st Defendant in Machakos HCCC No 169 of 2009 in which the suit land included a parcel of land known as Mavoko Town Block 3/2117; that the suit was determined by the court on 15th May, 2017 and that the issues in the present suit were directly and substantially in issue in Machakos HCCC No. 169 of 2009 (O.S).
3. The Defendants' counsel submitted that in the Plaintiff, the Plaintiff acknowledged the existence of Machakos Matrimonial Cause No. 10 of 2017; that the Matrimonial court is the proper court to deal with this dispute and that this court should down its tools.
4. The Plaintiff's counsel deponed that the parties in this suit are not the same as the parties in HCCC No. 169 of 2009 (O.S); that unlike the current suit, the former suit only had one Defendant and that the remedies sought in the two suits are remarkably different.
5. The Plaintiff's counsel further submitted that the issue of *res judicata* cannot be raised by way of a Preliminary Objection but ought to be raised by way of a formal Application.
6. On the issue of whether this court has jurisdiction to deal with the suit, the Plaintiff's counsel submitted that the remedies sought in this matter are against third parties, in addition to the Plaintiff's spouse; that the remedies herein cannot be issued in a matrimonial property cause and that the objection should be dismissed.
7. I will begin with the issue of whether this court has jurisdiction to entertain this claim. If indeed the court does not have jurisdiction, then it cannot deal with the other issues raised in the Preliminary Objection.
8. In the Plaintiff dated 4th October, 2017, the Plaintiff averred that she was the wife of the 1st Defendant; that during the pendency of the marriage, they acquired parcel of land known as Mavoko Town Block 3/2117 (*the suit property*) and that she later on realised that the Defendants had illegally and fraudulently sub-divided the suit land. The Plaintiff is seeking for the cancellation of the titles that arose from the sub-division of the suit land.

9. It is therefore obvious from the Plaintiff that the Plaintiff is alleging that although she is entitled to the suit land, the 1st Defendant fraudulently caused the land to be sub-divided and transferred the sub-divisions to the 2nd, 3rd and 4th Defendants. She wants those transactions not only cancelled, but also for an order that the 1st Defendant holds the title to the suit land in trust for her.

10. The suit before this court is therefore not the division of matrimonial property. The suit involves other third parties, other than the Plaintiff's spouse. The suit raises the issue of the alleged fraudulent sub-division of the land, not only by her former husband but by the 2nd, 3rd, 4th and 5th Defendants. To the extent that this suit pertains to the alleged fraudulent dealings with the suit land, and not for a declaration of rights between spouses *per se*, I find that the court has the requisite jurisdiction to deal with the matter.

11. On the issue of whether the suit is *res judicata* HCCC No. 169 of 2009 (O.S), I find and hold that the issue cannot be determined by way of a Notice of Preliminary Objection. The Defendants should have filed a formal Application annexing the pleadings and Judgment in HCCC No. 169 of 2009 (O.S) to enable the court determine if, firstly, the parties in this suit are the same, or litigating under the same title as the parties in HCCC No. 169 of 2009 (O.S); secondly, if the matter in issue is identical in both suits; thirdly, if there is concurrence of jurisdiction of the court and lastly if there is a final determination as far as the previous decision is concerned.

12. Having not filed a formal Application annexing the pleadings and Judgment concerning HCCC No. 169 of 2009 (O.S), I find that the Preliminary Objection dated 20th November, 2017 is unmeritorious.

13. For those reasons, the Notice of Preliminary Objection dated 20th November, 2017 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE