



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC LAND CASE NO. 343 OF 2015**

**MARGARET MATUNDA TENGIA**

**JACOB MWAKUGHU TENGIA (Suing as**

**Administratrix and administrators of the**

**Estate of the late JERVAN PAUL TENGIA.....PLAINTIFFS**

**VERSUS**

**COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT**

**RULING**

1. The defendant filed a preliminary objection dated 28<sup>th</sup> January 2016 that the plaintiff's suit is res judicata MSA HCC Civil Case No 634 of 2001. In support of this preliminary objection, the defendant submitted that Jervan Paul Tengia deceased filed civil suit No 634 of 2001 against the Municipal Council of Mombasa (now the defendant). The subject matter of the dispute is that case was plot in 1778/V/MN and 1779/V/MN.

2. The current plaintiffs have brought the present suit as the administrators of the estate of the said Jervan Paul Tengia and modified the earlier pleadings by providing for an alternative remedy not being to enforce the judgement obtained in case No 634 of 2001. The defendant contends that these were issues determined by a Court of competent and similar jurisdiction as this Court. He relied on the following decisions to support their submissions:

**i. Section 7 Civil Procedure Act**

**ii. Abdul Kassim Hassanali Gulam Hussein Khala vs. Southern Credit Banking Corporation Ltd. Civil Case No. 270 of 2005.**

**iii. Lilian Njeri Muranja & 2 Others vs. Virginia Nyambura Ndiba and Kajiado County Government. Civil Case No. 1271 of 2014.**

**iv. Akamba Public Road Service Vehicle vs. Samwel Nyamume Osere. Civil Appeal No. 133 of 2012.**

3. The defendant also submits that the plaintiffs are suing under the same title as in the former case. That

the issues raised in this suit ought to have been raised in the former suit. Finally the defendant submits litigation must come to an end and urged the Court to strike out this suit with costs.

4. The preliminary objection is opposed by the plaintiff interestingly by filing grounds of opposition. I say interesting because in my view a preliminary objection cannot be replied to by filing grounds as that amounts to raising a preliminary objection to a preliminary of objection. Be that as it may, I have perused the said grounds which I quote hereunder:

- a. The Preliminary Objection is misconceived, bad in law and an abuse of the process of Court.**
- b. That the subject matter in dispute in Civil suit No. HCC No 634 of 2001 and the current suit are different.**
- c. That there is no evidence that the issue in the current suit has been heard and determined.**
- d. That the Preliminary Objection does not raise a pure point of law which when determined will dispense of the entire suit as held in the classic exposition in the case of Mukisa Biscuits Manufacturing Co Ltd – vs West end Distributors (1969) E.A 696 which the plaintiff/Applicant shall be relying on.**
- e. That the Preliminary Objection is incompetent and cannot be a basis of dismissing and or deciding this suit at this stage.**

**That the Preliminary Objection be dismissed with costs.**

The plaintiff submits that what has been raised is not a pure point of law. That the decree issued in the former suit was declaratory in nature requiring the defendant to act by surrendering vacant possession of the suit plot. The defendant failed to give vacant possession thus giving the plaintiff a right to seek further redress from this Court which is a monetary claim for the value of the two parcels. That the cause of action would have not occurred had the defendant complied with the decree in civil case No 634 of 2001. In support of their submissions, the plaintiffs placed reliance on the case of **Ghela Marex Shah & Another vs Mohamed H. Abdulla & Another (1962) E A.**

Section 7 of Civil Procedure Act provides thus ***“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”***

***“Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”***

The plaintiffs does not deny that 634 of 2001 was heard and determined by a Court of competent and concurrent jurisdiction and that they are litigating under same title. The only issue which I deduce to be in dispute is whether the cause of action in this suit is similar to the cause of action in the former suit.

In the plaint before Court, it is pleaded thus in paragraph 5; the plaintiffs aver that the defendant predecessor (Municipal Council of Mombasa) without any right whatsoever caused **plot No. 1778 and 1779** to be allocated to other people while the plaintiffs’ lease was in subsistence such that the plaintiffs were unable to take possession. Further paragraph 8; the plaintiffs aver that as a result of this deprivation the late **Jervan Paul Tengia** filed a suit against the defendant predecessor in 2001 demanding to be allowed to get his plots back but after the hearing he discovered that these plots had been allocated to other parties and that the defendant or its predecessor was not in a position to return the said plots. Paragraph 13; the plaintiffs aver that the defendant and or its processor has acted in a manner which has

violated the plaintiffs fundamental rights provided for under the Constitution as regards to ownership of property and that the lease has been cancelled without any justification whatsoever and the plaintiff seeks compensation for the said cancellation.

The entire plaint generally refers to the defendant allocating their plots (suit plots) to other parties therefore depriving them the right to own property and benefit from such ownership hence the defendant should be ordered to pay special, general and exemplary damages. As set out in paragraph 8 above, the plaintiff discovered before the former suit had been concluded and that the suit plots had been allocated to other parties. He did not state what stopped him from amending his pleadings to make an alternative prayer for damages in the event the defendant could not surrender vacant possession of the suit plots.

The issue in dispute in the former suit as in this suit is illegal repossession of suit plots by the defendant. The cause of action arose therefore at the same time and not after the decree in the former suit had been issued as is submitted by the plaintiff. The plaintiff is submitting that this suit was filed because they could not execute the decree in HCC No 634 of 2001 cannot be accepted that it generated a new cause of action.

11. Lastly the plaintiff submitted that this preliminary objection did not satisfy the principle of preliminary objection as was described in the case of **Mukisa Biscuits vs West End** case. I do not think he is right as the preliminary objection was strictly premised on the provisions of section 7 and 8 of the Civil Procedure Act which are purely points of law. The plaintiff even admitted in their submissions that they filed this suit because they were unable to execute the decree in HCC 634 of 2001. As pointed out by the defendant, litigation must come to an end. The plaintiff should not abuse the Court process by litigating issues piecemeal. Accordingly I find merit in the preliminary objection.

**Dated, signed & delivered at Mombasa this 28th day of April 2017**

**A. OMOLLO**

**JUDGE**