



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 53 OF 2017**

**JOHN SEGUTON CHELIMO.....PLAINTIFF**

**VERSUS**

**MAURICE OGERO NYAKUNDI..... DEFENDANT**

**R U L I N G**

1. The plaintiff herein filed a plaint dated **16/3/2017** on **17/3/2017** seeking an order of permanent injunction against the defendant restraining the defendant and all who claim under him from interfering with the plaintiff quiet possession of land parcel No. **Kwanza/Kanyarkwat/352**.
2. Together with that plaint was filed a Notice of Motion dated **16/3/2017** seeking an interim order of injunction against the defendant pending the hearing, first of the application and, secondly, of the suit.
3. Before the application could be heard the defendant raised a preliminary objection vide a notice filed on **5/4/2017**. It has seven limbs as follows:-
  1. That the application is fatally defective and the same ought to be struck out for being otherwise an abuse of the due process of the court.
  2. That the application is *subjudice* as the plaintiff/respondent has filed a suit while there is a pending matter vide ELC No. 39 of 2016 regarding the same parties and the same cause of action.
  3. That the court issued an order in ELC No. 39 of 2016 dated 10<sup>th</sup> March, 2016 that the status quo with regard to the suit property being land Plot No. 309 Kanyakwat Settlement Scheme be maintained.
  4. The said order indicated that the *status quo* obtaining is that the applicant who is the respondent herein, is in possession of the suit land.
  5. The suit is thus bad for duplicity, as the same was filed after ELC No. 39 of 2016 over the same cause of action.
  6. The court has no jurisdiction to grant the orders sought.
  7. The application is otherwise misconceived, bad in law, lacks merit and an abuse of the court process.

4. It is clear that the preliminary objection principally revolves around the existence of a parallel suit, to wit **Kitale ELC No. 39 of 2016**.

5. Ms. Mengich, while arguing the preliminary objection before this court on **13/7/2017** said that it is based on **Section 6 of the Civil Procedure Act**. She urged that the plaintiff in this case is the defendant in **ELC No. 39 of 2016** and that the cause of action relates to plot **No. 309 Kanyarkwat Settlement Scheme** which the plaintiff herein alleges was subdivided into two.

6. Ms. Mengich referred me to the affidavit of the defendant as supporting the preliminary objection. However, a preliminary objection needs to stand on its own. It should be self-evident from the facts that have been pleaded by the parties or by implication.

7. Reference to the contents of an affidavit and annexures implies that there are matters of fact which are yet to be ascertained, which goes contrary to the idea of a preliminary objection as expressed in the celebrated case of **Mukisa Biscuit**. In the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] 696** the court stated as follows:-

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

Later on in the same judgment, Sir Charles Newbold stated as follows:-

**“A preliminary objection is in the nature of what used to be a demurrer. It raised 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasions, confuse the issue. The improper practice should stop.”**

8. The nature of the objection herein is such that it compels the court to refer to the filed affidavits and other documents and seek to ascertain some issues beyond the provided pleadings and I find that this is not proper. I need not say more in order to avoid jeopardizing the Notice of Motion.

9. I therefore dismiss the preliminary objection and order that the arguments that are raised herein be raised in the hearing of the notice of motion dated **16/3/2017**. However, there shall be no orders as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this **31<sup>st</sup>** day of **July, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**Ruling read in open court in the absence of the parties who had been notified of the date but failed to turn up.**

**MWANGI NJOROGE**

**JUDGE**

**31/07/2017.**