



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
OF KENYA AT KITALE
ELC CASE NO.27 OF 1999

GILIDI CHERUIYOT KIPKOECH.....PLAINTIFF

VERSUS

NATHAN KIPCHUMBA LAGAT & 2 OTHERS...DEFENDANT

RULING

1. The Preliminary Objection raised by the respondent is dated **13/3/17** and it has only one ground: that the Notice of Motion dated **6/3/2017** is premised on a parcel of land being **Kaplamai/Sirende/Koitogos/28** which is not a subject of the current suit and which belongs to a person not a party to these proceedings hence the application is fatally defective.

2. For clarity, it is proper to state at this point that the Notice of Motion dated **6/3/2017** seeks orders that the 2nd defendant be evicted from land parcel **Kaplamai/Sirende/Koitogos/28** and that the Officer Commanding Cherangani Police Station do enforce and provide security to the auctioneers while they execute the said orders. Costs are also sought to be provided for.

3. Hot on the heels of this application came another one filed by the 2nd defendant seeking the following orders:

(1)spent

(2) That there be a stay of execution of the judgement of this honourable court delivered on 16th September, 2015 and all consequent orders and proceedings pending herein and final determination of this application.

(3) That the honourable court be pleased and is hereby pleased to review its judgement delivered on 16th September, 2015 and all consequent orders by entering judgement in favour of the 2nd defendant/applicant as against the plaintiff/respondent or make directions for re-hearing of the matter pursuant to the provisions of Order 45 (r.5) of the Civil Procedure Rules, 2010; and

(4) Costs of the application be granted to the 2nd defendant/applicant

4. The Preliminary Objection looks straightforward enough: that the Notice of Motion is in respect of a parcel of land different from the one in the suit and which is owned by a person not party to the proceedings.

5. In support of his objection the 2nd defendant tries to draw a distinction between the parcel Number in the application dated **6/3/2017** and the number of the land parcel in the Suit. The number of the land parcel subject matter of the suit, he urges is **LR NO. Kaplamai/Sirende/Koitogos /28**. The 2nd defendant urges that the objection is a valid Preliminary Objection and that plaintiff's Notice of Motion dated **6/3/2017** should be dismissed on the basis of the objection.

6. On the other hand the plaintiff urges that the objection is not a true preliminary objection as the court may have to examine "pleadings and facts" in order to determine the same; that the documents needed for this exercise would need to be produced before court by way of an Affidavit, and that makes the objection to be incapable of being considered as preliminary objection.

7. This court only needs to determine one issue in this matter at this point: Does the Notice dated **13/3/2017** raise a true preliminary objection? As was stated in the case of ***Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors, (1969) EA 696***, a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all 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. The 2nd defendant urges that the judgment delivered on **16/9/2015** granted eviction orders in respect of a parcel different from that mentioned in the Application dated **6/3/2017**.

8. Since the judgment forms part of the record of this court it is quite easy to refer to it and confirm if this is true. Ascertainment of some facts also necessitates a scrutiny of the pleadings. Examination of pleadings is allowed in the determination of preliminary objections. The court in the Mukisa Biscuit case (supra) has found as much. The proper position is that a preliminary point may arise by way of implication arising from the pleadings.

9. The judgment dated **16/9/2015** shows that the plaintiff sued in respect of **LR No. Kaplamai/Sirende/Koitogos/28** measuring **5.809Ha**. The plaintiff produced a title deed marked **PEXh1**. PEXh1 reads that the parcel No. is **LR No.Kaplamai/Sirende Block 4/Koitogos/28**. This number is at variance with **LR No.Kaplamai/Sirende/Koitogos/28** which is stated in the application dated **6/3/2017**.

10. In this case even the judgment of the court is at hand to clarify the issue of which land reference number was the subject of the court's orders. I do agree with the 2nd defendant that the particular number of the Land parcel is very important is comes to execution proceedings. Execution must be carried out in respect of only the land in the judgment that is the only execution that may be allowed under a decree.

11. In the current situation, the application has cited a different number. It is not possible at this stage to understand why the plaintiff got the number right while doing his pleadings and in the evidence in chief yet he has not cited the right number in the application for execution. Consequently, I uphold the preliminary objection raised vide the Notice dated **13/3/2017**. The Application dated **6th March 2017** is hereby stuck out with costs to the 2nd defendant.

It is so ordered.

Dated, signed and delivered at Kitale on this 24th day of August, 2017.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Kiplagat holding brief for Seii for Plaintiff

Mr. Wafula holding brief for Kenei for 2nd Defendant

N/A for 1st and 3rd Defendants.

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017