



**REPUBLIC OF KENYA**

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

**CASE No. 112 OF 2017**

**MUHU HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**JAMES MUHU KANGARI.....DEFENDANT**

**RULING**

1. This ruling is in respect of defendant's Notice of Preliminary Objection dated 7<sup>th</sup> April 2017. The grounds of the preliminary objection are:

1. *The instant suit offends the provision of Section 6 of the Civil Procedure Rules (sic) 2010.*
2. *That there are suits pending court determination in Nairobi High Court Succession Cause No. 1027 of 1989 consolidated with Cause No. 226 of 2013 In the Matter of the Estate of James Muhu Kangari between the parties herein and touching on the same subject matter.*
3. *That the Honourable Court lacks jurisdiction to hear and determine this matter since the same raises matters of family dispute over distribution of an estate of the deceased.*
4. *That the instant application and the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process hence a good candidate for striking out with costs.*

2. The preliminary objection was heard by way of written submissions. In that regard, the defendant's written submissions were filed on 24<sup>th</sup> July 2017 while the plaintiff's written submissions were filed on 28<sup>th</sup> July 2017. The defendant argues that the suit property herein is part of the estate of James Muhu Kangari (deceased) which estate is the subject of Nairobi High Court Succession Cause No. 1027 of 1989 consolidated with Cause No. 226 of 2013 In the Matter of the Estate of James Muhu Kangari. Consequently, the suit herein is *sub judice* and therefore offends the provisions of section 6 of the Civil Procedure Act. For similar reasons, the defendant argues that this court lacks jurisdiction since the matter basically concerns the administration of the estate of a deceased person.

3. The plaintiff maintains in its submissions that the dispute in this suit is not one of administration or distribution of the estate of a deceased person. It is simply a dispute concerning trespass and encroachment on the plaintiff's land. Consequently, the plaintiff is entitled to move this court and that this court is clothed with jurisdiction in the matter pursuant to section 13(2) of the Environment and Land Court Act. Regarding the question as to whether this suit offends the provisions of section 6 of the Civil Procedure Act the plaintiff submitted that it does not.

4. I have considered the preliminary objection, the submissions by the parties as well as the authorities

cited. The law on preliminary objections is settled. A preliminary objection must be on a pure point of law. In Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, the *locus classicus* on preliminary objections in this region, Law JA stated:

*So far as I'm 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*

Further on, Sir Charles Newbold JA, stated:

*The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 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 occasion, confuse the issue. The improper practice should stop."*

5. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The salient features of a valid preliminary objection were reiterated in Oraro v Mbaja [2005] eKLR where Ojwang J (as he then was) stated:

**I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a 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 with learned counsel, Mr. Ougo, that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."**

6. In the present case, the preliminary objection has been raised by the defendant. It can only be argued on the assumption that facts as pleaded by the plaintiff are correct. The defendant cannot seek to introduce evidence to support the preliminary objection. Grounds 1, 2 and 3 of the preliminary objection boil down to whether or not suit offends the provisions of Section 6 of the Civil Procedure Act thereby rendering it *sub judice*. Section 6 of the Civil Procedure Act. The section provides as follows:

***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.***

7. I would need to receive evidence to enable me determine whether or not the matters in issue in this suit are also directly and substantially in issue in the previously instituted Nairobi High Court Succession Causes No. 1027 of 1989 and No. 226 of 2013 and whether or not parties in both matters are the same or litigate under the same title. Such evidence would include but not limited to copies of pleadings, proceedings, rulings and or judgment in the said cases. No such evidence had been placed on record by the plaintiff as at the date the preliminary objection was filed. Similarly, ground 4 of the preliminary objection seeks to show that the suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process. All these allegations need to be established by way of evidence.

8. Evidence cannot be introduced later to prop up a preliminary objection. If the defendant wishes to have the plea of *sub judice* and the other issues raised by the preliminary objection properly adjudicated, the defendant may consider bringing an application to that effect with the appropriate supporting evidence. For now I have no hesitation in finding and holding, as I hereby do, that the preliminary objection has no merit. It is dismissed with costs.

**Dated, signed and delivered in open court at Nakuru this 29<sup>th</sup> day of September 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Waiganjo holding brief for Ms. Irungu for the plaintiff

No appearance for the defendant

Court Assistant: Gichaba