



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NO. 11 OF 2017

MWANGI STEPHEN MURIITHI.....PLAINTIFF

VERSUS

HON. DANIEL T. ARAP MOI.....1<sup>ST</sup> DEFENDANT

RAYMARK LIMITED.....2<sup>ND</sup> DEFENDANT

RULING

*(Ruling on preliminary objection; defendants argue that suit offends sections 6 and 7 of the Civil Procedure Act; plaintiff arguing that the preliminary objections are not valid preliminary objections and that sections 6 and 7 of the Civil Procedure Act are not offended since suit raises new issues; parties had litigated over a parcel of land in the High Court, Court of Appeal and there's a pending application for leave to appeal to the Supreme Court; the present suit concerns a subdivision of the parcel that was litigated upon; held that the suit offends sections 6 and 7 of the Civil Procedure Act; suit struck out)*

1. This ruling is in respect of two preliminary objections: the 1<sup>st</sup> defendant's Notice of Preliminary Objection dated 20<sup>th</sup> March 2017 and the 2<sup>nd</sup> defendant's Notice of Preliminary Objection dated 28<sup>th</sup> March 2017. The former was filed on 23<sup>rd</sup> March 2017 while the later was filed on 28<sup>th</sup> March 2017.

2. The 1<sup>st</sup> defendant's preliminary objection is on the grounds that the suit herein violates sections 6 and 7 of the Civil Procedure Act; that this Court lacks jurisdiction and finally that want of a practicing certificate on the part of an advocate who draws a conveyancing document does not affect the validity of the document. On its part, the 2<sup>nd</sup> defendant's preliminary objection states that the matter herein has been extensively canvassed in courts of similar or higher jurisdiction; that the matter in issue has been extensively adjudicated in courts of competent jurisdiction; that there are substantial similarities between the matter in question in this suit and in the former suits; and that this court is *functus officio*.

3. The preliminary objections were argued by way of written submissions. In his written submissions filed on 18<sup>th</sup> May 2017 the 1<sup>st</sup> defendant argued that this suit is *res judicata* since it raises issues of right to property in respect of LR No.11793/2 which is a portion of LR. No. 11793. That the said issue was determined in High Court Petition No. 625 of 2009.

4. The 1<sup>st</sup> defendant further cited Section 6 of the Civil Procedure Act and argued that the issue of plaintiff's interest in LR. No. 11793 was determined in High Court Petition No. 625 of 2009 and in the

court of Appeal in Civil Appeal No. 240 of 2011 and that there is currently pending in the Supreme Court an application seeking leave to appeal to the said court.

5. Finally, the 1<sup>st</sup> defendant argued that this court lacks jurisdiction to entertain the suit in view of the fact that the issues raised in this suit are before the Supreme Court. The 1<sup>st</sup> defendant cited various authorities in support of his submissions.

6. The 2<sup>nd</sup> defendant also cited Section 6 of the Civil Procedure Act and argued that this Court lacks jurisdiction in view of the fact that the issues raised in the suit are pending before the Supreme Court. Further, the 2<sup>nd</sup> defendant also cited Section 7 of the Civil Procedure Act and argued that the issues raised on this suit are *res judicata* since they were determined in the High Court and Court of Appeal in the cases which have been cited by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant also relied on several authorities in support of the submissions.

7. On his part, the plaintiff opposed the preliminary objections. Counsel for the plaintiff submitted that matters concerning land should always be determined on their merits as opposed to technicalities. In that regard counsel relied on the provisions of Section 19 (1) and (2) of the Environment and Land Court Act, 2011. Counsel further reminded the court that striking out is a draconian remedy which should be exercised cautiously.

8. The plaintiff also took issue with the preliminary objections and argued that they are based on disputed facts and do not therefore qualify to be valid objections. In particular, the plaintiff pointed out that the 1<sup>st</sup> defendant had sought to rely on the contents of a Replying Affidavit filed by the plaintiff, after the preliminary objection had been filed.

9. Finally, the plaintiff argued that the pleas of *res judicata* and *sub judice* were improperly raised by way of the preliminary objections since such pleas require the court to consider evidence from both sides. That therefore, *res judicata* and *sub judice* should be raised by way of an application so that the plaintiff is afforded an opportunity to respond by way of evidence.

10. Nevertheless, in his submissions, counsel for the plaintiff reviewed the documents or record with particular regard to the issues raised in High Court Petition No. 625 of 2009 and the subsequent litigation. The plaintiff contends that *res judicata* does not apply since the proceedings in the High Court Petition concerned LR. No.11793 while this suit concerns a different property being LR. No. 11793/2. The plaintiff thus argues that both *res judicata* and *sub judice* are not applicable in the circumstances.

11. I have considered the preliminary objections, the submissions and the authorities cited by the parties. The following issues emerge for determination:

- a) Whether the preliminary objections are valid
- b) Whether the issues raised in this suit are *res judicata* and the suit offends the provisions of Section 7 of the Civil Procedure Act
- c) Whether the suit offends the provisions of Section 6 of the Civil Procedure Act
- d) Whether the suit should be struck out

12. So as to put matters in proper perspective, it is important to give a little background of the suit. This background is generated exclusively from the case as pleaded by the plaintiff on the date of filing the suit. The plaintiff filed this suit on 3<sup>rd</sup> March 2017 pursuant to plaint dated 28<sup>th</sup> February 2017. The plaint was accompanied by a Verifying Affidavit in which the plaintiff deposes that the facts stated in the plaint are correct.

13. Among the averments in the plaint, in paraphrase, are that the plaintiff and the 1<sup>st</sup> defendant were

directors of Mokamu Ltd, a Company which was the registered proprietor of all that parcel of land known as LR No.11793; that the plaintiff was detained without trial between 1982 and 1985 during which period the aforesaid property was illegally subdivided and disposed of by the 1<sup>st</sup> defendant and another co-director; that the plaintiff was issued with a certificate of Title in respect of LR. No.11793/2 (IR 48615) which was the smallest portion out of the three sub-divided portions; that the plaintiff filed Constitutional Petition No. 625 of 2009 at the High Court in Nairobi against the 1<sup>st</sup> defendant claiming violation of his fundamental rights to own property including his right to the aforesaid LR No. 11793; that the second defendant participated in the aforesaid proceedings as an interested party and made claims that the aforesaid parcel of land has never been owned by Mokamu Ltd; that the petition was allowed in favour of the plaintiff but the decision of the High Court was overturned by the Court of Appeal in Civil Appeal No. 240 of 2011 and; that at the time of filing this suit, an application seeking leave to appeal to the Supreme Court is pending being Supreme Court Civil Application No. 44 of 2014.

14. On the basis of these and other averments in the plaint, the plaintiff prays for judgment against the defendants for cancellation of some entries on Certificate of Title No. L.R. No. 11793/2 (I.R. 48615) and an order to evict the defendants from L.R. No. 11793/2 (I.R. 48615) among other prayers.

15. Together with the plaint, the plaintiff filed a List of Documents. Among the documents listed therein are Judgment in Nairobi Petition No. 625 of 2009, Judgement in Nairobi Civil Appeal No. 240 of 2011 and Originating Motion in Civil Application No. 44 of 2014 at the Supreme Court of Kenya. A copy of each of these documents is included in the bundle of documents.

16. A reading of the Judgement in Petition No.625 of 2009 shows that the plaintiff was awarded Kshs.57,420,000 which amount comprised his share of the value of LR No. 11793 plus his other interests in Mokamu Ltd. Needless to reiterate, the High Court award was set aside by the Court of Appeal and the plaintiff is currently seeking to be allowed to appeal to the Supreme Court.

17. Let's now revisit the issues for determination. The first issue is whether the preliminary objections are valid. The law relating to preliminary objections is well settled. A preliminary objection must be on a pure point of law. It helps if the point of law is precisely, briefly and clearly defined in the notice of preliminary objection. 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.***

Still in the same case, **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.***

18. It is clear from the foregoing that the following ingredients must be present for a preliminary objection to succeed: 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. Mr. Thuita, learned counsel for the plaintiff, submitted that the preliminary objections herein are based on disputed facts and do not therefore qualify to be valid objections. According to him, the disputed facts are the nature of the proceedings and the relief sought in Nairobi Petition No. 625 of 2009. He cited the authority of **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. Ogo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”**

19. There can be no doubt that a preliminary objection cannot be based on disputed facts. Are the preliminary objections here based on disputed facts? I do not think so. Simply put, the preliminary objections are that in view of the proceedings and judgment in Nairobi Petition No. 625 of 2009 and Nairobi Civil Appeal No. 240 of 2011 and in view of the pending Supreme Court Civil Application No. 44 of 2014 the suit herein violates Sections 6 and 7 of the Civil Procedure Act and that therefore this Court lacks jurisdiction to entertain the matter. As I have outlined at paragraph 13 above, the plaintiff gave a synopsis the proceedings and judgment in Nairobi Petition No. 625 of 2009 and Nairobi Civil Appeal No. 240 of 2011 as well as the pending Supreme Court Civil Application No. 44 of 2014 in his plaint. He verified those details by an affidavit. He included copies of the judgments and the application in his bundle of documents. The plaint and the bundle of documents were served on the defendants at the commencement of the suit, long before the preliminary objections were filed. The facts as concern the relief sought in and the status of Nairobi Petition No. 625 of 2009, Nairobi Civil Appeal No. 240 of 2011 and Supreme Court Civil Application No. 44 of 2014 are not contested and do not therefore require proof. Those facts have been put before this court by the plaintiff. I therefore find and hold that the preliminary objections are validly raised and merit consideration.

20. The next issue is whether the issues raised in this suit are *res judicata*. In other words, does this suit offend section 7 of the Civil Procedure Act? The said section provides:

***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.***

21. For *res judicata* to apply, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once gain in the new suit. The Supreme Court of India explained the essence of the principle of *res judicata* in **M. Nagabhushana v. State of Karnataka & Ors. [2011] INSC 88** as follows:

***“14. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, ‘interest reipublicae ut sit finis litium’ which means that it is in the interest of the State that there should be an end to litigation and the other principle is ‘nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause’ meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause.***

***This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest.***

***15. That principle of finality of litigation is based on high principle of public policy.***

***In the absence of such a principle great oppression might result under the colour and pretence***

*of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy.*

*That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties.*

22. The plaintiff in this suit acknowledges that there has been litigation in the High Court in Nairobi Petition No. 625 of 2009 and in the Court of Appeal in Nairobi Civil Appeal No. 240 of 2011 between himself and the defendants herein. The parties in the previous proceedings are the same as the parties in this suit.

23. Among the issues dealt with in the petition and the appeal was the alleged violation of plaintiff's fundamental rights to own property including his right to LR No. 11793 and compensation for its loss. The petition was heard on its merits and judgment delivered. The ensuing appeal to the Court of Appeal was similarly heard and determined on its merits. The Judgement in the petition shows that the plaintiff was awarded Kshs.57,420,000 which amount comprised his share of the value of LR No. 11793 plus his other interests in Mokamu Ltd. The plaintiff states in the plaint herein that LR. No.11793/2 (IR 48615), the suit property herein, is one of the three subdivisions of LR No. 11793. Logically, a judgment concerning the whole of the property *ipso facto* also concerns a fraction of the property. I therefore find that the issue of the plaintiff's right to own LR. No.11793/2 (IR 48615) and compensation for its loss was also an issue in the previous cases and was heard and determined in those cases. Therefore, all the ingredients of *res judicata* have been satisfied. I find that the issues raised in this suit are *res judicata* and that this suit offends section 7 of the Civil Procedure Act.

24. The next issue is whether the suit offends the provisions of 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.***

25. I have already discussed at length the fact that there have been proceedings between the parties herein on similar issues as those raised in this suit in Nairobi Petition No. 625 of 2009 and Nairobi Civil Appeal No. 240 of 2011 both of which have been determined. Currently, Supreme Court Civil Application No. 44 of 2014 is pending before the Supreme Court. It's an application for leave to appeal to the Supreme Court against the decision of the Court of Appeal. The dispute is pending in the Supreme Court. I have no hesitation in finding, as I hereby do, that this suit offends the provisions of Section 6 of the Civil Procedure Act.

26. The last issue is whether this suit should be struck out. Alongside this issue, I'll also consider whether a land suit, as submitted on behalf of the plaintiff, ought to be heard on the merits as opposed to being concluded on a technicality. In support of that submission, counsel for the plaintiff cited Section 19 (1) and (2) of the Environment and Land Court Act, 2011. The section provides:

## **19. Procedure and powers of the Court**

**(1) In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.**

**(2) The Court shall be bound by the procedure laid down by the Civil Procedure Act.**

27. Though the foregoing provision, just like Article 159 (2) (d) of the Constitution, enjoins the court to administer justice without undue regard to procedural technicalities, the provision is also emphatic that the court is bound by the procedure laid down by the Civil Procedure Act. A case concerning an interest in land is a case like any other. Its filing, hearing and determination must be in accordance with the law. The provisions of section 19 (1) and (2) of the Environment and Land Court Act, 2011 and Article 159 (2) (d) of the Constitution do not introduce or warrant a lower standard for land cases. As was stated in **M. Nagabhushana v. State of Karnataka & Ors.** (supra), the plea of *res judicata* is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation.

28. I have already found that the preliminary objections herein were validly raised and that this suit offends both sections 6 and 7 of the Civil Procedure Act. Should I therefore strike out the suit? I remind myself that save for right of appeal, which the plaintiff is properly pursuing in Supreme Court Civil Application No. 44 of 2014, litigation must come to an end. I further remind myself that striking out is a draconian remedy that should only be resorted to in the clearest of cases. I am alive to the wise counsel of Madan JA in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** that:

*A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.*

*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.*

29. I do not think that this suit can be sustained by amendment of the plaint or otherwise. *Res judicata* and *sub judice* are principles that go to the core of rule of law as far as litigation is concerned. Any suit that runs afoul these two principles has zero chance of survival. In view of my finding that this suit offends both sections 6 and 7 of the Civil Procedure Act I am convinced that this is an appropriate case in which to exercise the drastic power of striking out. In the end, I strike out the suit with costs to the defendants.

30. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of September 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms. Mcharo holding brief for Mr. Thuita for the plaintiff

Mr. Ouma for the 1<sup>st</sup> defendant

Mr. Makau holding brief for Ms. Njoroge for the 2<sup>nd</sup> defendant

Court Assistant: Gichaba