



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1232 OF 2015

GEORGE WAWERU NJUGUNA.....PLAINTIFF

VERSUS

PAULINE CHESANG GITAU KAMUYU.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant by way of a plaint dated 1st December, 2015 claiming that he is the registered proprietor of all that parcel of land known as ESCARPEMENT/KINARI BLOCK 1/1440(hereinafter referred to as “the suit property”) and that the defendant had trespassed thereon on a date which is not stated in the plaint and started interfering with his rights over the same. The plaintiff averred that he had on several occasions asked the defendant to vacate the suit property but the defendant had failed to do so thereby rendering the filing of this suit necessary. The defendant appointed a firm of advocates which filed a notice of appointment of advocates on 14th December, 2015 together with a notice of preliminary objection dated 10th December, 2015. The defendant is yet to enter appearance and file a statement of defence.

In her preliminary objection, the defendant contended that the court has no jurisdiction to hear this suit on account of the fact that the issues raised by the plaintiff had been raised in an earlier suit which suit was heard and determined by a court of competent jurisdiction. The defendant termed the plaintiff’s suit a grave abuse of the judicial process and prayed for punitive costs.

What is before me for determination is the defendant’s preliminary objection. The objection was argued by way of written submissions. The defendant filed her submissions on 17th October, 2016 while the plaintiff filed his submissions in reply on 21st October, 2016. In her submissions, the defendant submitted that the plaintiff filed a case namely, Nairobi HCCC 1636 of 1996 against one, STEPHEN GITAU KAMUYU, deceased (hereinafter referred to as “the deceased”). The deceased was the husband of the defendant. In that case, the plaintiff sought orders restraining the deceased from interfering with the suit property which the plaintiff claimed to be the owner. The plaintiff obtained ex parte judgment in that case against the deceased on 25th September, 1998. The plaintiff did not however serve the deceased with the notice of the said judgment and no further orders were sought by the plaintiff to evict the deceased from the suit property.

The defendant submitted further that on 21st October, 2014, the plaintiff filed an application in the said suit seeking an order for the committal of the deceased to civil jail for contempt of court. The plaintiff had claimed that the deceased had defied the judgment that had been issued against him on 25th September,

1998 which required him to stop trespassing on the suit property. The plaintiff's contempt application was heard and dismissed by Mutungi J. on 10th September, 2015. The defendant submitted that the plaintiff's contempt of court application was dismissed on the grounds that the plaintiff had failed to prove that he had served the deceased with a copy of the court order which he claimed to have been disobeyed and that the application which was for the enforcement of a judgment entered in 1998 was time barred.

The defendant submitted that the deceased died shortly after the dismissal of the said application. The plaintiff then filed another suit, namely, Nairobi ELC No. 924 of 2015 and obtained ex parte orders restraining the burial of the deceased on the suit property. The plaintiff failed to serve the said orders and the application for injunction upon the defendant. The plaintiff never turned up for inter-partes hearing of the application and the same was dismissed by the court for non-attendance. The plaintiff thereafter withdrew the said suit with costs to the defendant which costs the plaintiff is yet to pay. It is after the withdrawal of that suit that the plaintiff filed the present suit against the defendant who is the widow of the deceased claiming that she had trespassed on the suit property. The defendant submitted that the plaintiff's suit is time barred and that the same is in any event *res judicata*.

In response to the preliminary objection, the plaintiff submitted that this suit is premised on trespass which is being perpetrated by the defendant on the suit property. The plaintiff denied that the suit is *res judicata*. The plaintiff submitted that his claim is against the defendant and not her deceased husband, STEPHEN GITAU KAMUYU who is not a party to this suit. The plaintiff submitted that the issues raised by the defendant are not pure points of law and as such do not fit the description of a preliminary objection. The plaintiff submitted that the determination of the issues raised by the defendant would require evidence hence should not have been raised by way of a preliminary objection.

The plaintiff submitted further that in the absence of a defence on record, the court cannot determine the merit of the plaintiff's claim against the defendant. The plaintiff submitted that the orders sought by the defendant are drastic and if granted would infringe upon the plaintiff's right to a fair hearing as the plaintiff's suit would have been dispensed with without a hearing on merit.

I have considered the defendant's preliminary objection and the opposition thereto by the plaintiff. The definition of a preliminary objection was set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, where Law J.A stated that:

"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."

In the same case, Sir Charles Newbold P. stated that:

"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"

In the case of, Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 others (2014) eKLR, the Supreme Court stated as follows on Preliminary Objection:

"To restate the relevant principle from the precedent setting case, Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors (1969) EA 696, 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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....."

