



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 279 OF 2014

DOKI INVESTMENT LTD.....PLAINTIFF

VERSUS

SILAS KIPCHILLAT.....1ST DEFENDANT

PAUL NDUNGU NJENGA.....2ND DEFENDANT

NANCY WACHEKE KAMAU.....3RD DEFENDANT

THE COMMISSIONER OF LANDS.....4TH DEFENDANT

THE UASIN GISHU DISTRICT

LAND REGISTERAR.....5TH DEFENDANT

RULING

This is the ruling in respect of a Preliminary objection dated 19th July 2017 by the 1st defendant on the grounds that:

1. That application dated 8 / 6/ 17 is incurably defective and should be dismissed with costs for contravening the provisions of section 7 of the Civil Procedure Act CAP 21 of the laws of Kenya as it amounts to *res judicata* since the matter is between the same parties over the same issues in **Eldoret HCC No. 207 of 2009** which was heard and dismissed on 15 / 2/ 2017 before Lady Justice Odeny.
2. The court *is functus officio*.
3. Conservatory orders being sort were granted in Eldoret HCC 207 of 209 vide Chamber summons dated 16 /12 /2009 but later varied, discharged and vacated for lack of merit.

This matter came to court under certificate of urgency on 13 / 6/ 17 where the court certified the same urgent and ordered that the application be served for inter parte hearing on 20 / 7/17. On 20 / 7/ 17 counsels agreed to the preservation of the suit land pending the hearing and determination of the application and the matter was slated for hearing of a preliminary objection filed by the 1st defendant on 28 / 9/ 17. Mr. Kibii counsel for the 1st defendant argued that there is another suit **Eldoret HCC No. 207 of 209** between the parties herein which was heard and determined by this court and the same was dismissed on 15 / 2/ 17 by this Honourable court. Counsel submitted that the current suit No. 279 of 2014

is *res judicata* and should be dismissed with costs to the 1st defendant. He further submitted that the replying affidavit by one Donald Kibera which alleges that the suit No. 207 of 209 was filed without their instructions however the said suit is not disputed that it is in existence. Further that no evidence has been presented in this court that Mr. Kariuki Mwaniki was not instructed. Mr. Kibii Counsel for the 1st defendant submitted that section 107 of the Evidence Act confirms that he who alleges must prove. The document annexed to the Preliminary objection has a verifying affidavit which was signed by the instant plaintiff in HCCC No. 279 of 2014. The verifying affidavit was attested by R. M. Wafula Advocate and the said Mr. Wafula and Mr. Mwaniki have not been called to swear affidavits that those documents were a forgery.

Mr. Kibii submitted that no criminal proceedings or any investigations have been carried out to confirm that it is a forgery. He therefore prayed that the Preliminary objection be allowed.

Mr. Wabwire Counsel for the 4th and 5th defendants supported the Preliminary objection by the 1st defendant. He stated that section 7 of the Civil Procedure Rules gives parameters of *res judicata*. The parties in HCC NO. 207 of 209 and the current suit are the same, the subject matter is also the same being **Eldoret Municipality Block 12/353**. Counsel further submitted that it would be an abuse of the court process to allow the plaintiff to litigate on the same matter. He prayed that the Preliminary objection be allowed and the suit be dismissed with costs to the defendant.

Mr. Aseso Counsel for the plaintiff opposed the Preliminary objection and relied on the replying affidavit sworn by Donald Kibera. He submitted that the Preliminary objection falls short of the Mukisa Biscuit's case as the Preliminary objection was filed with annexures which alone asks the court to look outside the pleadings. He stated that in the alternative if the court finds that the Preliminary objection is proper it should find that no decree has been attached therefore the court cannot guess whether the matter was dismissed or not.

Mr. Aseso submitted that the plaintiff denied instituting any other suit and has also appointed only one counsel to represent it in this case as per the resolution annexed to the affidavit. He further stated that the plaintiff has made it clear that he is a stranger to the pleadings and therefore the burden shifts to the person alleging that the suit was filed. It would be in the interest of justice that if a party has indicated that it did not bring a suit it is only fair that the matter is heard on merit. He therefore prayed that the Preliminary objection be dismissed.

Mr. Kibii Counsel for the 1st defendant in response submitted that the Preliminary objection is based on points of law and that the annexures are attached to the Preliminary objection but not marked as exhibits. He further submitted that the two cases exist and that the issue of resolution was introduced under the 2010 Civil Procedure Rules as previously it was not a requirement.

Analysis and determination.

The Court has considered the Notice of Preliminary Objection and the responses by the counsel for the Plaintiff and the 4th & 5th defendants herein. The issue that the court must address is as to whether the preliminary objection meets the threshold as per the case of Mukisa Biscuit Manufacturing Ltd. Vs. West End Distributors Ltd (1969) EA 697. In the above stated case, Court described Preliminary Objection as:

-

“A Preliminary Objection is in the nature of what used to be called demurrer. It raises pure points of law, which is argued on the assumption that all the facts pleaded 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 improper raising of Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse issues”.

It should be noted from the above narrative that a preliminary objection is based on points of law and in most cases, is capable of disposing of matters at an interlocutory stage from the pleadings without looking

outside of the pleadings before it.

The defendants submitted that the current suit was *res judicata* and should therefore be dismissed. Section 7 of the Civil Procedure Act provides for the parameters of *res judicata*. It provides that:

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 issues has been subsequently raised, and has been heard and finally directed by such a court.”

It is clear that HCC No. 207 of 2009 was filed by the plaintiff DOKI INVESTMENTS LTD against the 1st defendant one SILAS KIPCHILAT. It is also notable that the current suit No. Environment and Land Court Case No. 279 of 2014 is also by the same plaintiff and the 1st defendant and additional 4 defendants. Further it is also not disputed that the subject matter in both suits is the same being ELDORET MUNICIPALITY BLOCK 12/353 situated at pioneer area of Eldoret Municipality.

Counsel for the plaintiff/respondent has raised an issue that the advocate who filed the previous suit did not have authority to do so. No affidavit has been sworn to convince the court that such is the correct position. It was submitted by counsel for the 1st defendant that he who alleges must prove. There is no proof that investigations were carried out on the issue of forgery or to the Law Society of Kenya for disciplinary action for an Advocate acting without instructions. Just shouting from the roof top that the plaintiff did not instruct Kariuki Mwaniki & Co. Advocates is not sufficient to prove the same. Mr. Aseso Counsel for the plaintiff did not state whether there were any criminal proceedings that were instituted against the culprits.

From the plaint the plaintiff is seeking for the same orders as previously sought in HCCC No. 207/09 which had been dismissed by this court. The court noted that the same had been dismissed on 26th May 2010 for non-attendance. The best that the plaintiff could have done is to make an application to reinstate the suit and not to file another suit with similar prayers, same party and an additional parties and same subject matter being ELDORET MUNICIPALITYBLOCK 12/353. Litigants should not be allowed to abuse the court process by filing multiplicity of suits in different courts to defeat justice.

The other issue that the previous case HCCC No.207 of 2009 was filed without a company resolution does not hold any water as this requirement was introduced by the 2010 Civil Procedure Rules. Mr. Wabwire Counsel for the 4th defendant also supported the Preliminary objection as the suit is an abuse of the court process. He submitted that it would be an abuse of court process to allow the plaintiff to litigate on the same subject matter with the same parties. Litigation must come to an end.

The Preliminary objection as raised does not require me to look outside the case as was submitted by Counsel for the plaintiff. The issues raised are points of law which had been pointed out at the onset of filing the defences. The annexures are attached to the PO and not marked as exhibits as was submitted by counsel for the 1st defendant.

I have considered the preliminary objection by the defendants together with the rival submissions of counsel and authorities thereof. I have come to the conclusion that the preliminary objection has merit and is therefore allowed with costs to the defendants. The upshot is that the suit is struck out.

Dated and delivered at Eldoret on this 24th day of October, 2017.

M. A. ODENY

JUDGE

Read in open court in the presence of:

Mr. Misoi for Plaintiff/Respondent

Mr. Koech: Court Assistant

In the absence of the defendants/Applicants