



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT OF KENYA
AT MILIMANI
ELC CASE NO. 1186 OF 2015
JANE WANJIRU THIONG'O suing in her
capacity as an administrator of the Estate of the Late
DEDAN THIONG'O KINGANGI.....PLAINTIFF/APPLICANT
= VERSUS =
SAMUEL KIMANI THUBE.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling in respect of a preliminary objection raised by the defendant and an application by the plaintiff seeking to amend the Plaint. The court directed that both the preliminary objection and the application for amendment be argued together to save on time.
2. The defendant's preliminary objection is based on three grounds namely:-
 1. *That he has been wrongly sued since he is not in occupation of LR No. 985 and has no interest in it.*
 2. *That the Plaintiff's suit is res judicata.*
 3. *That the plaintiff's suit is an abuse of the process of the court.*
3. The plaintiff's application is seeking to amend the Plaint to indicate the correct parcel number. The plaintiff contends that when she filed the suit, she indicated that the subject matter of the suit was LR NO. 985 instead of LR NO.988.
4. The Plaintiff has opposed the defendant's preliminary objection on the ground that what is raised in the first ground is not a point of law. That it is actually a point of fact which cannot be raised as a point of law. The Plaintiff also contends that the suit is not res-judicata as the High Court in succession Cause No. 676 of 2006 only stayed confirmation of grant pending determination of the respective claims by objectors in that cause in the relevant courts. For instance in the case of the defendant who was one of the objectors, he is expected to prove that he is entitled to plot No. LR 988 through the Environment and Land Court and that is why he has raised a counter-claim in the present case.
5. On the issue of abuse of the process of the court, the plaintiff contends that she is entitled to bring a claim in court since her position is that the defendant never purchased the land he is currently occupying.

6. As regards the plaintiff's application for amendment, the defendant does not raise any grounds in opposition to the same save for stating that the application has been made following his preliminary objection.

7. I will first deal with the issue of preliminary objection. A preliminary objection was defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd. –Vs- Westend Distributors [1969] EA 696** as follows:-

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. In the first ground on the preliminary objection raised by the defendant, he contends that he is neither occupying plot No. LR 985 nor is he interested in it. This is not a point of law. What he is contending can only be ascertained through evidence. This point cannot therefore be raised as a point of law.

9. The defendant is contending that the suit herein is res-judicata. The principle of res-judicata is premised on Section 7 of the Civil Procedure Act which states 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 of 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.

10. In the instant case, the defendant had moved to the family division of the High Court in succession cause no.676 of 2006 where he filed a protest that he was a purchaser and interested in one of the subdivision of a larger portion owned by the late Dedan Thiong'o Kiangangi. The High Court stayed the matter pending hearing and determination of the protesters claims in the relevant courts. The High Court did not deal with the issue of ownership of the disputed plot which is now the subject of litigation before this court. The present case is therefore not res-judicata.

11. The plaintiff's case is not an abuse of the process of court. The term abuse of the process of court connotes that the process of the court should be used fairly and not as a means of vexation. This case does not have any element of abuse of the process of the court. The defendant's allegation that it is an abuse of the process of court is not founded on any legal or factual basis. It is therefore clear that the defendant's preliminary objection lacks merit. The same is hereby dismissed with costs to the plaintiff.

12. I now come to the Plaintiff's application for amendment. The plaintiff is seeking to amend the plaint to indicate the correct parcel number. The law is clear that amendments should be given freely at any stage of proceedings unless they will cause prejudice to the other party. In the instant case, the case is at its initial stages. The plaintiff has realized that she had indicated the wrong parcel number in the plaint. It does not matter that the amendment is being sought after the defendant had raised the issue of the plot in his preliminary objection. I find that the plaintiff's application is well founded. I allow the same in the following terms.

1. The plaintiff shall file and serve the amended plaint within 7 days from the date of this ruling.

2. The defendant is at liberty to amend his defence and counter-claim if need be within 14 days from the date of service of the amended plaint.

3. The defendant shall pay the costs of this application as well as the dismissed preliminary objection.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **4th** day of **October, 2017**.

E. O. OBAGA

JUDGE

In the presence of;-

Mr Cohen for Mr Onyango for applicant

Mr Nganga for defendant present

Court Assistant: Hilda

E. O. OBAGA

JUDGE