



IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 97 OF 2014

GEORGE KAMAU KIMANI & FOUR OTHERS ::::::::::::::: PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF

TRANS-NZOIA & ANOTHER ::::::::::::::: DEFENDANT

RULING

1. A Preliminary Objection was taken on behalf of the first defendant on the ground that the suit herein is resjudicata and that leases signed by the plaintiffs and the second defendant are unenforceable as they were not registered and or sealed by the second defendant.
2. Professor Sifuna for the first defendant argued that the former advocate for the plaintiffs had conceded in Environment and Land Case No. 66 of 2013 that the leases were not registered and that they were not sealed and that since the court ruled on this point, the suit herein is therefore res judicata.
3. The advocates for the plaintiffs and the second defendant opposed the preliminary objection on the ground that the same does not qualify as a preliminary objection. The advocate for the second defendant argued that if the first defendant's advocate wanted to raise a preliminary objection based on res judicata, he should have done so through an application and annex the other decision of the court so that the court can determine the matter and not on the basis of a preliminary objection.
4. Mr Nyamu for plaintiffs argued that what Professor Sifuna was raising requires certain facts to be addressed and as such the points raised by Professor Sifuna do not meet the requirements of a Preliminary point of objection. Mr Nyamu relied on the *case of Mukasa Biscuit Manufacturing Co. Ltd -Vs- West End Distributors [1969] EA 696*.
5. I have considered the points raised by the first defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection. In this regard I adopt the words of *Sir Charles Newbold P. in Mukisa Biscuit case (Supra)* which are applicable in the

present circumstances.

“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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issues. This improper practice should stop”.

6. I find that the preliminary objection by the first defendant lacks merits. The same is hereby dismissed with costs to the plaintiffs and the second defendant.

It is so ordered

Dated, signed and delivered at Kitale on this 29th day of October, 2014.

E. OBAGA

JUDGE

In the presence of Mr Teti for M/S Arunga for 2nd defendant, Professor Sifuna for the first defendant and Mr Nyamu for Plaintiffs. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

29/10/2014