



**Mangoka v Malului & 5 others (Environment & Land Case
15 of 2018) [2024] KEELC 3864 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 15 OF 2018**

TW MURIGI, J

MAY 15, 2024

BETWEEN

THOMAS KIOKO MANGOKA PLAINTIFF

AND

KILLIAN MALULUI & 5 OTHERS DEFENDANT

RULING

1. This ruling is in respect of the Preliminary Objection dated 25th November, 2019 raised by the Plaintiff's on the following grounds:-
 1. The counter-claim being a claim over land is a non-starter for failure to obtain consent under Section 30(1) Cap 284.
 2. A claim in respect to land in an Adjudication Section is unsustainable in a court of law for want of consent.
 3. The issue of ownership is res-judicata in view of determined HC A No. 169/1971 Nairobi over the same land between the same parties or their successors in title.
2. The preliminary objection was canvassed by way of written submissions.

The Plaintiff's Submissions.

3. The Plaintiff's submissions were filed on 18th May 2021. On his behalf, Counsel submitted that the court has no jurisdiction to determine ownership over the suit property as it falls within an Adjudication Section. Counsel further submitted that the Defendants did not obtain consent from the Land Adjudication Officer to file the suit herein as stipulated in Section 30 of the [Land Adjudication Act](#). Concluding his submissions, Counsel urged the court to strike out the counter-claim with costs to the Plaintiff.



The Defendant's Submissions

4. The Defendants submissions were filed on 16th December 2023. Counsel submitted that the only issue for determination is whether the preliminary objection dated 25/11/2019 is merited. Counsel submitted that the instant Preliminary objection does not meet the threshold of a preliminary objection as it is based on facts which must be supported by evidence. According to Counsel, a defence and counter-claim is one of the ways in which a party can respond to a plaintiff. Counsel further submitted consent from the Land Adjudication Officer was not necessary as the counter-claim was made in the course of the suit herein.
5. It was further submitted that consent to file a suit is issued when the Land Adjudication Officer is unable to deal with certain issues.
6. Concluding his submissions, Counsel submitted that the preliminary objection does not raise a pure point of law and urged the court to dismiss it with costs.

Analysis And Determination

7. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated:-

“So far as I’m aware, a preliminary objection consists of point of law which have 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.”

8. Further on 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 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.”

9. In *Oraro v Mbaja* 2005 eKLR Ojwang J (as he then was) described it as follows: -

“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 process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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”.

10. The issue of jurisdiction and res judicata are pure points of law which can determine the matter without having to consider the merits of the case. This Court is satisfied that the Plaintiff's Preliminary



Objection is based on a pure point of law. Having considered the preliminary objection in light of the pleadings and the rival submissions, the following issues arise for determination:-

- i. Whether consent from the Land Adjudication Officer was a mandatory requirement before filing the counterclaim.
 - ii. Whether the instant suit is res judicata.
11. As regards the first issue, the Plaintiff contended that the Defendant's counter-claim is a non-starter for lack of consent from the Land Adjudication Officer.
12. By a Plaint dated 3rd July 2015, the Plaintiffs instituted this suit against the Defendants seeking the following orders:-
- a) Perpetual injunction permanently restraining the Defendants their family members, agents and employees, any other people howsoever related to the Defendants from interfering with the Plaintiffs portion of land by trespassing, cultivating, occupying and in any other manner working on the part of the Plaintiff's land No. P/No. Kisekini Land Adjudication Section to the detriment of the Plaintiff's family members.
 - b) General damages.
 - c) Costs of this suit.
13. The Defendant filed a statement of defence and counterclaim dated 12th November 2018 denying the Plaintiffs claim. In his counterclaim, the Defendant seeks the following orders:-
- a) The 5th Defendant be declared the legal owner of the portion of land he occupies in Plot No. 916 Kisekini Adjudication Section by adverse possession.
 - b) The 5th Defendant be registered as the sole proprietor of a portion he occupies in Plot No. 916 Kisekini Adjudication Section.
 - c) The last original indentures in respect of P/No. 916 Kisekini Adjudication Section which are with the Plaintiff be dispensed with.
14. It is not in dispute that the suit property falls within Kisekini Adjudication Section. The record shows that on 21st April 2015, the Plaintiff was granted consent to obtain an injunction restraining Gabriel Maluli Meka from putting up permanent structures on Plot No. 916 Kisekini Adjudication Section. The Defendant in his counterclaim is seeking a declaration that he is the legal owner of the portion of land that he occupies in the suit property by virtue of adverse possession. He is also seeking to be registered as the sole proprietor of the portion that he occupies within the suit property. From the foregoing, it is clear that the Defendant is seeking a declaration of ownership over the portion he occupies in the suit property which is within an Adjudication Section.
15. Section 30 (1) of the [Land Adjudication Act](#) stipulates as follows: -
- (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.
16. The wording in Section 30(1) of the [Act](#) is mandatory. It sets out the conditions under which a party can approach the court before the adjudication process is complete. The requirement for consent to be granted by the Land Adjudication Officer before a suit can be filed is a statutory requirement.



17. In the case of *Benjamine Okwaro Estika v Christopher Anthony Ouko & Another* [2013] eKLR the Court of Appeal held that:

“That being so, the mandatory requirement of section 30(a) had to be complied with i.e. consent of the Land Adjudication Officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it. From what we have discussed above, it will be clear that we are in full agreement with the learned judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”

18. There is no evidence that the Adjudication Register has become final. It is crystal clear that the Defendant was required to obtain consent from the Land Adjudication Officer, Makueni Adjudication Area before instituting his counterclaim for the recovery of a portion of land in Parcel No. 916 Kisekini Adjudication Section. The Defendant argued that consent from the Land Adjudication Officer was not a mandatory requirement since the counter-claim was filed in response to the suit.

19. It is common knowledge that a counterclaim is a suit on its own and it therefore has its own life in law. The Defendant is actually the Plaintiff in a counterclaim. This court therefore finds and holds that the Defendant’s counterclaim is independent of the Plaintiff’s claim as it is a suit on its own.

20. From the foregoing, this court finds and holds that the Defendant has failed to comply with the mandatory provisions of Section 30(1) of the *Land Adjudication Act* before approaching this court.

21. As regards the second issue, the Plaintiff contended that the suit herein is res-judicata of HCA No. 169 of 1971. The doctrine of res-judicata is embedded in Section 7 of the *Civil Procedure Act*, which provides as follows: -

“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.”

22. In the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR the Court of Appeal set out the elements of res judicata as follows: -

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”



23. In the matter at hand, the Plaintiff did not produce the proceedings and judgment in HCA 169 of 1971 to show that this suit is res-judicata as alleged.
24. In the end I find that the preliminary objection partially succeeds to the extent that in the absence of consent from the Land Adjudication Officer, this court has no jurisdiction to deal with matters that fall within an Adjudication Section.
25. Accordingly, the Defendant's counter claim is hereby struck out with costs.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF MAY, 2024.

IN THE PRESENCE OF:

Court assistant Alfred.

Mwangangi for the Defendant.

Kiluva holding brief for Maakundi for the Plaintiff.

