



Muntet & another v Muntet & another (Environment & Land Case E004 of 2024) [2024] KEELC 4934 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4934 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E004 OF 2024**

**CG MBOGO, J
JUNE 24, 2024**

BETWEEN

NEMUTA ENE MUNTET 1ST PLAINTIFF

KINYIKITA MUNTET 2ND PLAINTIFF

AND

TAATAI OLE MUNTET 1ST DEFENDANT

ENFORCE LIMITED 2ND DEFENDANT

RULING

1. The 2nd defendant/ respondent filed a notice of preliminary objection dated 8th May, 2024 challenging the notice of motion dated 21st March, 2024 on the following grounds: -
 - a. This honourable court cannot lawfully exercise its jurisdiction on the matters raised since the suit property Cis-Mara/Oldonyo-Rasha/ 527 is the subject matter in a suit that is still alive before this honourable court i.e. ELCLC E008 of 2023 Enforce Limited versus Taatai Ole Muntet and Another.
 - b. The application is any event bereft of any lawful evidence of proprietorship/interest on the subject property and therefore the plaintiffs/applicants lack locus.
 - c. The application is not only an abuse of court process but it is made in bad faith.
2. Mr. Nchoko Bosco, the learned counsel for the plaintiffs/ applicants filed a replying affidavit to the notice of preliminary objection sworn on 4th June, 2024. The learned counsel deposed that the preliminary objection is not founded on pleadings on record, and it has been made in vacuum as no substantive application has been filed. Further, he deposed that the plaintiffs are wives of the 1st defendant/ respondent in a case which has no bearing in the present case. He deposed that the suit



- before the court though touching on a similar property, it does not revolve around the same parties, and the orders sought are distinct.
3. The learned counsel deposed that no foundation has been laid to warrant the matter to be considered sub judice as per Section 6 of the Civil Procedure Act and as such, the preliminary objection is misconceived.
 4. The preliminary objection was canvassed by way of written submissions. The 2nd defendant/ respondent filed their written submissions dated 12th June, 2024 where it raised two issues for determination as follows: -
 - a. Whether the preliminary objection is merited.
 - b. Whether the plaintiffs should bear the costs.
 5. On the first issue, the 2nd defendant/ respondent submitted that it is not in dispute that the subject matter property LR. No Cis Mara/ Oldonyo-Rasha/ 527 is the subject matter in ELCLC E008 of 2023 that is pending before this court, and that was filed prior to the instant suit. That in as much as the plaintiffs/ applicants are not parties in ELCLC E008 of 2023, they are litigating over the same subject matter as the said suit, and its outcome will automatically impact the subject matter in this suit. Further, it was submitted that the issue of matrimonial property raised in the instant suit is directly and substantially linked to the issues for determination in the suit filed earlier.
 6. The 2nd defendant/ respondent submitted that the plaintiffs/ applicants lack the locus standi to institute the suit as they are bereft of any lawful evidence of proprietorship in the subject property. They submitted that the suit and the application ought to be dismissed with costs.
 7. The plaintiffs/ applicants filed their written submissions dated 18th June, 2024, where they raised one issue for determination which is whether the preliminary objection on account of subjudice is merited.
 8. On this issue, the plaintiffs/ applicants submitted that the rule of sub judice would apply only if there is identity or similarity of the matter is issue in both suits. That one of the critical features of the doctrine of sub judice is that both suits as they are, must challenge or be geared at arriving at the same decision. The plaintiffs/ applicants submitted that the cause of action and the reliefs sought in the two cases are distinct and any decision reached in No. E008 of 2023 would only benefit the plaintiff in that suit.
 9. The plaintiffs/ applicants submitted that the two suits though being in respect of the same subject matter, have distinct issues that need to be looked at in terms of the prayers and orders sought. Further, they submitted that the parties are different in both suits, and who are seeking to assert their rights to property which is a constitutional guarantee under Article 40 of the Constitution. They submitted that the mere fact that the plaintiffs/ applicants herein are married to the defendant in both suits does not make them a branch of the husband in respect to asserting their rights as regards to the property in question. They relied on the cases of Thiba Min Hydro Co. Limited versus Josphat Karu Ndwiga [2013] eKLR, In the matter of the Interim Independent Electoral Commission, Constitutional App. No. 2 of 2011 [2011] eKLR, Republic versus Paul Kihara Kariuki, Attorney General & 2 Others Ex-parte Law Society of Kenya [2020] eKLR, Margaret Wachu Karuri versus John Waweru Ribiro [2021] eKLR and Cyrus Mucebiu Irungu versus Martha Wanjiru Irungu & Another [2022] eKLR.
 10. I have considered the preliminary objection and the written submissions filed by the plaintiffs/ applicants and the 2nd defendant/ respondent. In my view, the issue for determination is whether there is merit in the notice of preliminary objection. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696 to mean: -



per Law, JA

“So far as I am 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. 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”.

Further Sir Charles Newbold, P stated that: -

“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”.

11. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct.
12. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
13. It is also this court’s opinion that in determining a preliminary objection, the court will consider that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another versus Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where the court held that: -

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
14. This court is persuaded by the findings in the case of *Oraro versus Mbaja* (2005) 1KLR 141, where the court held that: -

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
15. In this case, the 2nd defendant/ respondent argued that the subject matter in this case is the subject matter in ELCLC E008 of 2023 that is pending before this court. The 2nd defendant/ respondent in its written submissions annexed a copy of the plaint in ELCLC.



16. The provisions of Section 6 of the *Civil Procedure Act* defines the above principle or the doctrine as follows;

“...No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”

17. In considering whether the instant suit is sub judice, this court will be required to ascertain through the evidence which would defeat the whole purpose of what a preliminary objection constitutes. Where the court is called to draw inference to that which is outside the pleadings herein, or that which is not a pure point of law, the preliminary objection is then defeated.

18. Arising from the above, the notice of preliminary objection dated 8th May, 2024 is hereby dismissed. I make no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JUNE, 2024.

HON. MBOGO C.G.

JUDGE

24/06/2024.

