Case Number:	Environment and Land Case 64 of 2003
Date Delivered:	29 Nov 2019
Case Class:	Civil
Court:	Environment and Land Court at Kericho
Case Action:	Ruling
Judge:	Anthony Kaniaru
Citation:	Tigisey Kipngeno Koech v Attorney General &3 others [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kericho
Docket Number:	-
History Docket Number:	-
Case Outcome:	Preliminary Objection dismisssed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E.L.C NO 64 OF 2003

TIGISEY KIPNGENO KOECH.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

DIRECTOR OF SURVEYS.....2ND DEFENDANT

EMMANUEL KIPKORIR KOECH & THOMAS KIPNGETICH LANGAT(Sued as Administrators of the estate of KIMITEI ARAP CHUMO (DECEASED).....3RD DEFENDANT

JEREMIAH KIPSANG LANGAT.....4TH DEFENDANT

RULING

1. This ruling is on a preliminary objection first intimated for raising in the 4th defendant's defence dated 2nd May, 2019 and filed on 6th May, 2019. The intimation was immediately actualised vide a Notice of Preliminary Objection contemporaneously filed with the defence. The objection is premised on three postulates viz:

1. That the subject matter in this suit has been previously adjudicated and a determination made before a relevant and competent forum to wit a court of law, consequently, this suit is RES-JUDICATA under the provisions of Section 7 of the Civil Procedure Act.

2. That the honourable court lacks jurisdiction to entertain this matter pursuant to Section 30 of the Land Adjudication Act and other relevant provisions of law.

3. That the plaint does not disclose nor raise any reasonable cause of action as against the 4th defendant.

2. On 25th June, 2019, the court directed that the objection be canvassed by way of written submissions. In that regard, the 4th defendant's submissions were filed on 16th October, 2019 while the plaintiff filed his own on 7th November, 2019.

3. In order to appreciate how the objection came about, it is necessary to have a brief look into the pleadings. The plaintiff first filed this case on 3rd September, 2003 vide a plaint dated 27th August, 2003. At that time, the plaintiff – **TIGISEY KIPNGENO KOECH** – filed it against two defendants only – **The Attorney General** (1st defendant) and the **Director of Surveys** (2nd defendant). It was clear then, as now, that the plaintiff brought the suit as the administrator of the estate of the late **JOHN MELILE KAPLELACH** who was said to have been allocated **PLOT NO G.13 GELEGELE SETTLEMENT SCHEME**. The size of the plot was said to be 43.4 acres, 9.2 of which was arable, while the rest, 34.2 acres, was largely marsh land.

4. But negligence attributed to an officer in the survey office is said to have led to hiving-off of the arable 9.2 acres and

amalgamated it with **PLOT NO G.43** thus distorting allotment as originally envisaged. The plaintiff pleaded that he suffered loss of the 9.2 acres valued at or about Kshs. 3,680,000. The defendants at the time filed a defence on 13th November, 2003 and denied the plaintiff's claim.

5. Later on, the plaint was amended and two defendants - **EMMANUEL KIPKORIR KOECH** and **THOMAS KIPNGETICH LANGAT** - together became 3rd defendant. They were sued as administrators of the estate of **KIMITEI ARAP CHUMO**. The late **KIMITEI ARAP CHUMO** was said to be the owner of land parcel S.S/43 to which the alleged 9.2 acres had been added. That parcel was at the time said to have been subdivided into parcels **NOS KERICHO/GELEGELE/144**, **145** and **146**. Further, parcel no. 144 was said to have been subdivided further into parcels NOS KERICHO/GELE/SS 211 and 212. The location of the 9.2 acres was said to be where parcel NOS 211 and 212 are.

6. It is clear that parcel NOS 211 and 212 were sold to the 4th defendant – **JEREMIA KIPSANG LANGAT** – and this therefore necessitated that this new owner be brought on board. A further amended plaint was filed on 11th March, 2019 including the new owner as the 4th defendant. The 4th defendant responded to the suit by filing his defence in which he intimated his desire to raise the objection now under consideration. The 4th defendant's defence is essentially a denial of the core issues raised in the plaintiff's claim. It is also an affirmation that (see paragraph 6 of the defence) that he is an innocent purchaser for value without notice of negligence or fraud from the original title holder.

7. It is obvious therefore that the suit herein is a serious contestation between the parties. More specifically, it is clear that the three limbs of the objection – resjudicata, jurisdiction, or non-availability of reasonable cause of action to the plaintiff - are all seriously contested. What the 4th defendant has done in his defence is to make serious averments in various paragraphs, which he seemingly believes are not open to dispute, but which the plaintiff is seriously contesting. It seems to me that the 4th defendant mis-apprehends what a preliminary objection is, or should be. The Law is that it is never premised on disputed or contested facts.

8. I deem it necessary to quote the apt and pertinent remarks of Sir Charles New Bold (as he then was) in the case of **MUKISA BISCUIT MANUFACTURES LTD VS WEST END DISTRIBUTORS LIMITED (1969) EA 696.** These are the same remarks quoted by the plaintiff in his submissions and they are 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice should stop.”

9. If one addresses oneself to the meaning, purport and/or implication of the above quotation, one would appreciate that a valid preliminary objection should be predicated on admitted or uncontested facts. It is supposed to have the characteristics of what used to be a demurrer. The **Black's Law Dictionary**: **Tenth Edition**: at **page 526** defines a demurrer as follows:

“A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer.”

10. Given the definition, it would be required that the 4th defendant accepts the truth of the facts alleged in the plaintiff's pleadings and after doing that, he is supposed to demonstrate that those facts are not, due to the applicable law, sufficient to entitle the plaintiff to get the remedies he is seeking.

11. Implicit in all this is that a preliminary objection, like all other laws, has to be based on facts. The preliminary objection itself should consist of pure points of law. But those points do not hang in the air. **EX FACTIS JUS ORITUR** (Law arises from a fact). And this is no exception when it comes to a preliminary objection. But a preliminary objection is based on only one type of facts namely: **UNCONTESTED** or **ADMITTED FACTS**.

Question is: Are the facts in this matter uncontested and/or admitted" The obvious answer to this is NO. Why then did the 4th defendant raise a preliminary objection based on contested or denied facts. The answer seems to me to be what I stated earlier. There is a mis-apprehension of what a preliminary objection is, or should be. The truth of the matter is that what is before me does not pass the test of what a proper preliminary objection should be.

12. It is useful to state here that I have decided to write this ruling without making much reference to the submissions filed. Not that I have not read the submissions; rather, it is that both learned counsel have eruditely availed substance which is good for use and consideration during trial and determination of the case. Definitive findings on my part concerning what has been availed by both learned counsel may obviate such use or consideration in later stages. Suffice it to say ultimately that the preliminary objection herein is, in light of the foregoing, unsound in its foundations and ill-advised. I therefore dismiss it with costs to the plaintiff.

Dated and signed at Kericho this 29th day of November, 2019.

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A. K. KANIARU

JUDGE