



Wanyama & another v Kurbale & 3 others (Environment & Land Case E042 of 2022) [2023] KEELC 17531 (KLR) (16 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E042 OF 2022**

CA OCHIENG, J

MAY 16, 2023

BETWEEN

FRANK OJIAMBO WANYAMA 1ST PLAINTIFF

MARY ABENE OJIAMBO 2ND PLAINTIFF

AND

FATUMA YUSSUF KURBALE 1ST DEFENDANT

BONIFACE OMUMANI 2ND DEFENDANT

LAND REGISTRAR, MACHAKOS 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. What is before Court for determination is the 1st Defendant's Notice of Preliminary Objection dated the 24th November, 2022 which is premised on the following grounds:-
 1. That the 1st Defendant is non-suited as she is neither the registered proprietor nor beneficial owner of the suit property: Mavoko Town Block 2/3816.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

3. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the only issue for determination is whether the suit against the 1st Defendant should be dismissed with costs
4. The 1st Defendant in her submissions insists that she is non-suited in this matter as she is neither the registered nor beneficial owner of the suit land. Further, that any orders issued against her, would be in



vain. To support her averments, she relied on the case of *Munywoki Musuva Ngao Vs Mutua Mbinda & Another* (2019) eKLR.

5. The Plaintiffs in their submissions contend that they purchased the suit land in 2014 and had the said land registered in their joint names. They claim that in very unclear circumstances, the 1st Defendant got registered as proprietor of the suit land on 18th December, 2015 yet they never transacted nor met her. They argue that any land transaction cannot be looked at in isolation and it is paramount to have a historical approach in order to appreciate any transfers that are in contention specifically in the instant case where the suit land was first transferred to the 1st Defendant without any logical basis. They insist that the 1st Defendant made the land to be fraudulently registered in her name and therefore she possesses beneficial as well as proprietary interest in detriment to them. To buttress their averments, they relied on the following decisions: *Chief Land Registrar & 4 Others v Nathan Tirop Koech & 4 others* (2018) eKLR; *Daykio Plantations Limited v National Bank of Kenya Limited & 2 Others* (2019) eKLR and *Presbyterian Foundation & Another Vs East Africa Partnership Ltd & Another* (2012) eKLR.
6. The 1st Defendant claims she is non-suited in this suit. From perusal of the Plaintiff dated the 28th April, 2022 the Plaintiffs sought for the following orders:
 - a. An order compelling the 3rd Defendant to cancel the registration of the 1st Defendant as the registered proprietor of land parcel number MAVOKO TOWN BLOCK 2/3816 and revert the registration to the name of the Plaintiffs.
 - b. An order of eviction of the 1st Defendant from the Plaintiffs' parcel of land known as Mavoko Town Block 2/3816.
 - c. An order of payment of mesne profits by the 1st Defendant to the Plaintiffs from 2015 until vacant possession granted to the Plaintiffs.
 - d. An order of permanent injunction against the 1st Defendant from accessing, trespassing and/or interfering whatsoever in any manner with the Plaintiffs' parcel of land known as Mavoko Town Block 2/3816.
 - e. Costs of this suit.
7. I note the 1st Defendant except for filing a Replying Affidavit and the instant Notice of Preliminary Objection, failed to file a Defence to controvert the Plaintiffs' averments. From the Plaintiff pleaded that the 1st Defendant had committed fraud in getting registered as proprietor of the suit land.
8. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held 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 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.”



9. While in the case of Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No. 53 of 2004, 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.”

10. Based on the facts before Court while associating myself with the quoted decisions, I find that the issues raised in the Plaint including allegations of fraud need to be ascertained. I opine that the 1st Defendant ought to have filed a Defence to controvert the Plaintiffs’ averments first and anchor her Preliminary Objection. To my mind I find that the 1st Defendant’s averments in the Notice of Preliminary Objection require evidentiary proof and are also based on matters of facts as she has to demonstrate how she was once registered as proprietor of the suit land.

11. In the circumstance, I find the Notice of Preliminary Objection dated the 24th November, 2022 unmerited and will disallow it. I direct the 1st Defendant to file and serve her Statement of Defence within twenty one (21) days from the date hereof.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF MAY, 2023.

CHRISTINE OCHIENG

JUDGE

