



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CONST. PET. NO. 2 OF 2021

ZADOCK MAKHANU KHAEMBA.....1ST PLAINTIFF

DENNIS WANYONYI SIMIYU.....2ND PLAINTIFF

VERSUS

THE LAND REGISTRAR.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

CAROLYNE NAFULA OMONDI.....3RD DEFENDANT

FELIX SHIKOLI AGUTU.....4TH DEFENDANT

DAVID INGOSI.....5TH DEFENDANT

RULING

On 25th August, 2020, Zadock Makhanu Khaemba, the 1st plaintiff herein, visited the Trans Nzoia County Land Registry at Kitale with a view to have a specific Power of Attorney which had been allegedly donated to him by one Dennis Wanyonyi Simiyu (the 2nd plaintiff) registered. The said Power of Attorney was in respect of a parcel of land known as **Kapko/Mabonde Block 1/Ex Prison/554**. In the narrative on the instrument, it was stated that the purpose of the Power of Attorney was to enable the 1st plaintiff to pursue a case which was pending before court which is **Chief Magistrate's Court Land Case No. 53 of 2020**. According to the 1st plaintiff, the Land Registrar has failed to register the instrument without ascribing any reason. It is on account of that failure to register the instrument that the 1st plaintiff filed the present suit. The 1st plaintiff is acting in person.

It is not clear from the pleadings what the plaintiffs want from the court - sufficient for this court to state it was able to ascertain from the 1st plaintiff and as gleaned from the pleading that he craves for orders from the court to compel the Land Registrar, Trans Nzoia County, who is listed as the 1st defendant, to register the instrument so that he can be duly appointed as the holder of the Power of Attorney on behalf of the 2nd defendant. Contemporaneous with filing what he referred to as a "draft plaint", the 1st plaintiff filed a notice of motion under certificate of urgency, seeking various declaratory orders which unfortunately are not supported by what is pleaded in the "draft plaint". When the matter was placed before this court for directions, it certified the application urgent and ordered the 1st plaintiff to serve the defendants. The defendants were duly served. The 3rd, 4th and 5th defendants entered appearance. They also filed grounds of opposition to the application and notice of preliminary objection to the entire suit.

During the hearing of the application, this court directed that the preliminary objection be disposed of first having determined that it raised a point of law that had the potential to determine the suit. The *locus classicus* case on what constitutes a preliminary objection is the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA-696** where it was held thus:

"A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which is argued as a preliminary point may dispose of the suit...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 facts has to be ascertained or if what is sought is the exercise of judicial discretion".

The preliminary objection raised by the 3rd, 4th and 5th defendants is to the effect that the 1st plaintiff lacked capacity to institute the suit hence the suit was incurably defective. They contended that the 1st plaintiff did not have the requisite qualification to institute the suit on behalf of the 2nd plaintiff. They urged that the suit was otherwise filed in abuse of the due process of the court.

On his part, the 1st plaintiff was emphatic that the suit was properly before the court as he was asserting breach of his constitutional right, inter alia, to own property.

Having evaluated the argument made before this court and the pleadings filed by the parties herein, this court formed the view that the issues that will dispose the preliminary objection are twofold; firstly, whether the 1st plaintiff has a cause of action which entitled him to file the present suit, and secondly, whether he had capacity to file the suit itself.

In respect of the first issue, the 1st plaintiff argued that he had a legitimate cause of action being the denial by the 1st defendant, the Land Registrar Trans Nzoia County to register the Power of Attorney instrument that he had presented for registration. The 1st plaintiff submitted that even though the 2nd plaintiff had not appended his signature on the pleadings, he had filed the suit on his own behalf and that of the 2nd plaintiff under **Article 22 (2) of the Constitution**. The defendants were of a contrary view. They submitted that the category of persons referred to in **Article 22(2) of the Constitution** did not include the circumstances of the present suit. This court agrees with the defendants. **Article 22 (2) of the Constitution** states as follows:-

“In addition to a person acting in their own interest, court proceedings under Clause (1) may be instituted by-

- a. a person acting on behalf of another person who cannot act in their own name;**
- b. a person acting as a member of, or in the interest of, a group or class of persons;**
- c. a person acting in the public interest; or**
- d. an association acting in the interest of one or more of its members”.**

In the present suit, it was apparent the 1st plaintiff failed to give reasons why the 2nd plaintiff failed to append his signature on the pleadings. It is not clear whether the 2nd plaintiff is suffering under any disability or is otherwise unavailable due to circumstances beyond his control; the 1st plaintiff failed to give an explanation what his relationship with the 2nd plaintiff is; is he a relative? He told the court that 2nd plaintiff was just his friend. This court hold that the 2nd plaintiff being, for all intents and purpose, an adult of sound mind, should have given his consent for this suit to be filed in his name. Such failure renders the suit incompetent.

As regard to 2nd issue whether the 1st plaintiff had legal capacity to file the suit, it was clear to this court that the 1st plaintiff filed this suit on behalf of the 2nd plaintiff. He has no discernable interest in the matter other than on expected windfall to the tune of Kshs. 1 Million should the suit succeed. In effect, the 1st plaintiff filed the suit for reward. He assumed the position of an Advocate yet he is not one. He assumed that if he obtained a Power of Attorney, it would camouflage his intentions. Unfortunately for the 1st plaintiff, he fell foul of **Section 31 of the Advocates Act** which provides that:

1. Subject to Section 33, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction”.

The consequences of infringement of this provision are spelt in **Section 31, 22, 34 and 4 of the Advocates Act**. The court in **Abraham Mwangi Njihia -vs- Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR** held thus:

“The general principle resonating from the authorities both from this Court and the Court of Appeal is that pleadings drawn, signed and presented by unqualified person cannot stand and ought to be struck out. I have no reason to divert from this principle”.

This court agrees with the above holding. In the premises therefore, for the reasons stated above, the entire suit is struck out as being incompetent and incurably defective. The 3rd, 4th and 5th defendants shall have the costs of the suit.

It is so ordered.

DATED AT KITALE THIS 20TH DAY OF APRIL, 2021

L. KIMARU

JUDGE

20/4/2021