



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

ELC NO. 130 OF 2016

AGNES MWARI.....PLAINTIFF

VERSUS

MARSABIT CLUSTER ISIOLO DEVELOPMENT PROJECT

(SUED THROUGH ITS DIRECTORS OF TRUSTEES) ...DEFENDANT

RULING

This Preliminary Objection dated 3rd November, 2016 has been raised by the Defendant who states that Plaintiff has no locu standi to institute this suit since her claim is based on inheritance acquired from her deceased's father yet she had no letters of administration. It is also averred that the Defendant is a stranger to the subject matter.

The Preliminary Objection was canvassed by way of written submissions of which both sides have filed. I have weighed all the arguments raised herein along with the cited authorities. Both sides are in agreement as to what a Preliminary Objection is. It consists of a pure points of law which have been pleaded, *Mutisa Biscuit Manufacturing Company Limited Versus West End Distributors Limited (1969) EA 696*. At page 700 paragraph D-E law JA as he then was had to say:-

"So far 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 off the suit . Examples are an objection to the jurisdiction of the Court's 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..."

The Defendant avers that Plaintiff has not obtained any letters of administration over the estate of her father James Barutu. This court has been urged to invoke the provisions of Section 82 of the law of Succession Act and find that Plaintiff is not the administrator of her father's estate.

A close scrutiny of the Plaint reveals that the land the Plaintiff is referring to is un-demarcated, unrecorded and unregistered. That contention has not been rebutted by the defence. If that be the case, it follows that the process of ascertainment and recording of rights and interest in land has not yet been done. Such rights and interest have not yet crystallized by way of registration and hence Plaintiff cannot be certain as to what belongs to the estate of the deceased. I believe this is the reason she has sued **“as the owner of all that un-demarcated and unregistered piece of land...”** see (Paragraph 4 of the plaint).

If the suit land is unregistered and un-demarcated, then this court would be interested in knowing under which category the land falls under. Is it public land, private land or community land?

In ELC Misc. Application No. 13 of 2012 at Malindi....Angote J. stated that “in my view any dealing in un alienated government land as defined in the constitution could only be dealt with as provided for in this constitution....”

This court would be interested in establishing how unregistered and un-demarcated land where ascertainment and recording of rights and interests have not been carried out is being alienated, by who and to whom.

The Plaintiff can only assert her claim if she is given an opportunity to adduce evidence. I therefore find that at this stage, the Preliminary Objection fails on the basis that Plaintiff does not have letters of administrators.

Is the defence properly sued? In the bundle of documents availed by the Defendant, Defendant is identified as **ISIOLO DEVELOPMENT PROJECT C.C.F AFFILIATED**

In some letters, Defendant refers to themselves as Christian Children’s Fund, Isiolo development project which is a child welfare organization.

In paragraph 2 of the plaint, the Defendant is identified as follows:-

“The Defendant is an adult person of sound mind, resident in Isiolo area within Isiolo County.”

It is clear that Defendant is not properly sued. However, as rightly submitted by the Plaintiff,

“No suit shall be defeated by reason of the misjoinder and non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.” Order 1 rule 9 of the Civil Procedure Rules.

The error made by the Plaintiff is not fatal to the suit and the court has the mandate to give directions to rectify the situation pursuant to provisions of order 1 rule 10

“The court may at any stage of proceedings either upon or without application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff, or defendant be struck out and that the name of any person who ought to have been joined whether as Plaintiff or defendant or whose presence before the court may be necessary in order to enable the court, to effectually and completely adjudicate upon and settle all questions involved in the suit be added.”

I therefore give directions that;

1. The plaint be amended accordingly for the Plaintiff to give the Defendant a proper description. The amended plaint is to be filed and served within 14 days from date of delivery of this ruling.
2. Defendant is at liberty to file a further amended defence within 14 days from date of service of amended plaint.
3. The Preliminary Objection is hereby dismissed and each party is to bear their own costs of the Preliminary Objection.

DELIVERED, DATED AND SIGNED AT MERU THIS 31ST DAY OF MAY, 2017 IN THE PRESENCE OF:-

CA: Janet

Plaintiff present

Kiome h/d for Mbaabu Inoti for Defendant

Miss Rimita h/b for Carl Peters Mbaabu for Plaintiff present

HON. L. N. MBUGUA

JUDGE