

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 14 OF 2007

MUTISYA NGAU.....PLAINTIFF

-VERSUS-

PETER MUTISO MBITHI.....1ST DEFENDANT

COMMISSIONER OF LANDS..... 2ND DEFENDANT

RULING

1) On the **26th July, 2017** the plaintiff and the first defendant agreed by consent to address the court on the issue of whether or not the latter is the registered owner of **plot number 957** as demonstrated by the pleadings and documents already filed in court. Both parties agreed to do so by way of written submission which the plaintiff did on the **2nd August, 2017**. The matter was fixed for mention on the **3rd October, 2017** with a view to confirming filing of sub-missions.

2) In his submissions, the plaintiff's counsel cited the case of **Mukisa Biscuits Co. Ltd -Vs- West End Distributors Ltd [1969] EA 696** which defines what constitutes a preliminary objection and pointed out that whether or not the 1st defendant is rightfully sued is purely a question of fact which can only be addressed in the course of trial. The counsel added that the contention by the 1st defendant's counsel that the pleadings and documents show that the 1st defendant is not the registered proprietor of **plot number 957** does not necessary qualify that question as a pure point of law.

3) On his part the first defendants' counsel submitted that from the pleadings by the parties herein and in particular the plaint, there is nothing to show what wrong the first defendant did in this matter and therefore there is no cause of action that has been shown against the first defendant.

4) The first defendant's counsel went on to submit that this court lacks jurisdiction to hear this matter because the consent that was given was illegal since the consent should have been given to the plaintiff after her objection was heard by the land adjudication officer. The counsel pointed out consent cannot be given when the register was declared final by the minister and title deeds issued.

5) Finally the counsel submitted that the office of the second defendant does not exist and any orders directed to it shall be in vain and it was upon the plaintiff to amend her pleadings to include the proper party.

6) I have read the submissions, and my finding is as follows:- whereas I agree with the plaintiff's counsel that the issue of whether or not the first defendant is the registered owner of plot number 957 is a question of fact which can only be determined upon trial, the pleadings and more particularly the plaint does not disclose the cause of action, if any, that the plaintiff has against the first defendant.

7) The above being the case, I am in agreement with the counsel for the first defendant that to proceed with suit would be a waste of time.

8) As regards non-existent of the office of the second defendant ad therefore rendering orders directed to it being in vain, **section 7(1)** of the Sixth Schedule of the Constitution comes into play but as earlier on observed, the plaint does not disclose a cause of action. In the circumstances, my finding is that the

preliminary objection has merits and I proceed to strike out the plaint with costs to the first respondent.

Signed, Dated and Delivered this 29th day of November, 2017

MBOGO C.G

JUDGE

Ruling read aloud and dated in open court in the presence of the first defendant and in the absence his counsel as well as the plaintiff and Mr. Kwemboi court

assistant.

MBOGO C.G

JUDGE