



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 65 OF 2015 (OS)

MARGARET WAMBUI MWANGI.....PLAINTIFF/RESPONDENT

VERSUS

THE DISTRICT LAND REGISTRAR KIRINYAGA.....1ST DEFENDANT/APPLICANT

THE COUNTY GOVERNMENT OF KIRINYAGA...2ND RESPONDENT/APPLICANT

RULING

By an Originating Summons filed herein on 3rd June 2015, the plaintiff sought a determination of the following questions:-

1. *That the defendants do show cause why the restriction placed against the plaintiff's title No. L.R KIINE/THIGIRICHI/527 by the 1st defendant with the instructions from the 2nd defendant on 18th February 2014 or other thereof should not be forthwith withdrawn/removed by the defendants or by an order of this Court.*
2. *That the restriction placed on L.R. KIINE/THIGIRICHI/527 be removed altogether and unconditionally by this Honourable Court.*
3. *That the costs of this Originating Summons be provided for.*

The said Originating Summons was based on the grounds set out therein and supported by the plaintiff's affidavit.

What is important for purposes of this application is that the plaintiff pleads that the land parcel No. L.R KIINE/THIGIRICHI/527 (the suit land) which was previously registered in her late husband's names is now registered in her names. However, on 18th February 2014, the 2nd defendant instructed the 1st defendant to place a restriction on the suit land yet it is not Government land as defined by **Article 64 of the Constitution** nor was it obtained through fraud to which the plaintiff was a party. That action is therefore a breach of the plaintiff's right to own property provided for under **Article 40(3) of the Constitution**. The plaintiff therefore filed a Certificate of Urgency seeking an expeditious determination of this Originating Summons.

The 2nd defendant filed grounds of objection to the said application and a notice of Preliminary Objection in which the following were raised:-

1. *That the suit is prematurely filed and in total contravention of the provisions of the Transition to Devolved Government (Transfer of Assets and Liabilities Regulations Act 2013) Cap 265 Laws of Kenya as the cause of Action arose during the reign of the now defunct County Council of Kirinyaga and not the defendant.*

2. *That the subject suit was un-procedurally and without the consent and or without consultation with the Transitional Authority and contrary to the provisions of Section 7 and 8 at Cap 265 A Laws of Kenya and this suit is therefore premature, band in law and a non-starter, null and void ab-initio and ought to be struck out with costs.*
3. *That the suit property L.R No. KIINE/THIGIRICHI/527 was initially public land and meant for public utility but was illegally, fraudulently, un-procedurally and un-lawfully transferred to the plaintiff's late husband with the connivance of the officials of the then Kirinyaga County Council and the plaintiff therefore has no good title to the same.*
4. *That there is a pending complaint before the National Land Commission which is the body constitutionally mandated to deal with among others illegally acquired land and the subject matter should therefore be stayed pending the conclusion of the said complaint before the said Commission.*
5. *That the ex-parte judgment allegedly delivered in KERUGOYA PMCC NO. 245 OF 2000 MARGARET WAMBUI MWANGI VS KIRINYAGA COUNTY COUNCIL is null and void ab-initio as it was among other factors made by a Court that did not have jurisdiction to hear the same as the suit property which measures approximately 97.8 Ha (244 Acres) clearly fell outside the jurisdiction of a Magistrate's Court and was in total disregard of the provisions of the now repealed Registered Land Act.*
6. *That the 2nd defendant is Constitutionally mandated to protect public property that falls within its jurisdiction and the placing of the restriction on the suit property is justified, merited and lawful in the circumstances pending the conclusion of the aforesaid investigation by the National Land Commission.*

The 1st defendant only entered appearance but has not to-date filed any response to the Originating Summons.

That Preliminary Objection raised by the 2nd defendant is the subject of this ruling. Submissions have been filed by both Kathuthu & Kahuthu Advocates for the plaintiff and J.M. Njenga & Company Advocates for the 2nd defendant.

I have considered those submissions and the pleadings herein which are really the starting point where an issue of Preliminary Objection is raised.

As is clear from the pleadings which I have summarized above, the plaintiff's case is that her land is not public land yet the 1st defendant on the instructions of the 2nd defendant has un-lawfully placed a restriction on it. The 2nd defendant's case, as is clear from the pleadings summarized above, includes claims that (1) the suit is in contravention of Chapter 265 of the Laws of Kenya, (2) that the suit land was initially public land meant for public utility which was un-procedurally, illegally and fraudulently transferred to the plaintiff's late husband and (3) that there is a pending complaint before the National Land Commission which is the body mandated to deal with issues concerning illegally acquired land.

It is clear from those pleadings that both issues of law and fact have been pleaded. While the plaintiff pleads that the suit land is not public land nor was it obtained through fraud or other improper means, the defendant insists that the land was fraudulently, un-procedurally and un-lawfully transferred to the plaintiff's late husband with the connivance of the officials of the then Kirinyaga County Council. It is plain that a Preliminary Objection can only be raised on issues of law and cannot be sustained if facts which require proof have been pleaded. This was clearly stated by **LAW J.A** in the case of **MUKHISA BISCUITS MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS (1969) E.A 696 at page 700** as follows:-

"... 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 of law may dispose of the suit. Examples are an objection to the jurisdiction of the Court 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".

In the same case, **Sir Charles Newbold** added the following:-

“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”.

From what I have stated above, facts that need to be proved through evidence have been pleaded and these include whether the suit land was properly acquired by the plaintiff’s late husband and later by the plaintiff or whether in fact the said land was fraudulently, illegally and un-procedurally transferred to the plaintiff’s late husband with the connivance of officials of the then Kirinyaga County Council. Those are not **“pure points of law”** which is what a Preliminary Objection is all about. **Ojwang J** (as he then was) described what a Preliminary Objection ought to be in the following simple terms in the case of **ORARO VS MBAJA 2005 1 K.L.R 141 at page 145**

“I think the principle is abundantly clear. A “Preliminary Objection’ correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed”

This is the route that Superior Courts in this country have followed with respect to what constitutes a Preliminary Objection and I do not need to re-invent the wheel. Suffice it to state that the issues raised by the 2nd defendant will require the Court to examine and make a factual finding on such matters as, for example, whether or not the suit land was obtained in an illegal manner. That is a matter that can only be determined after hearing evidence from the parties. It cannot be determined in limine and therefore cannot be the basis upon which a proper Preliminary Objection can be founded.

I have said enough to show that the 2nd defendant’s Preliminary Objection is wholly un-meritorious.

The same is dismissed with costs to the plaintiff to be met by the 2nd defendant.

It is so ordered.

B.N. OLAO

JUDGE

22ND APRIL, 2016

Ruling dated, delivered and signed in open Court this 22nd day of April 2016

Mr. Macharia for Wambua for 2nd Defendant present

No appearance by other side.

B.N. OLAO

JUDGE

22ND APRIL, 2016