



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENT DIVISION
ELC CIVIL SUIT NO. 470 OF 2010

WINNIE NJERI KARIUKI.....PLAINTIFF

VERSUS

CONSOLATA WANGECHI MURIUKI1ST DEFENDANT

SAMUEL MUREITHI MURIUKI.....2ND DEFENDANT

SILAS MURIOKI NDEI.....3RD DEFENDANT

JOHN MWANGIMUTITU.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The notice of preliminary objection dated 4th November 2014 is brought by the 5th Defendant under Order 2 Rule 15(1) and (2), Order 25 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The 5th Defendant states that the suit as drawn discloses no cause of action as against it. Further, the 5th Defendant contends that the Plaint as drawn against it is frivolous, vexatious and scandalous.

The preliminary objection was canvassed by way of written submissions. The 5th Defendant in submissions dated 27th November 2014 reiterated the facts of the case as pleaded and averred that since the Plaintiff had not registered a restriction against title to LR No. Nairobi/Block 119/1531, there was no basis upon which the Registrar could have taken cognizance of her claim to LR No. Nairobi/Block 119/1531 (herein after referred to as “**the suit property**”) alleged to be matrimonial property. It was submitted that the Plaintiff claims beneficial interest in the suit property pursuant to substantial investments made in the property.

Counsel submitted that if the transfer of the suit property was effected by the 3rd Defendant to the 1st Defendant with intent to defeat the Plaintiff’s claim, the Registrar cannot be alleged to have been guilty of fraud. It was submitted that there was no wrong doing on the part of the Registrar who effected a transfer upon being presented with all the requisite documents as mandated under the law. The 5th Defendant submitted that the Plaint as drawn does not raise any claim against the Registrar of Lands and that it was therefore an abuse of the court process to drag the Registrar into these proceedings.

The Plaintiff in submissions dated 15th January 2015 argued that the preliminary objection which was being filed almost five years after the institution of the suit was not on a point of law as held in the case of **Mukisa Biskuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969)EA696**. The Plaintiff submitted that a similar application seeking to have the suit struck out or dismissed under sections 1 and 3 and Order 2 Rule 17 had been moved by the 4th Defendant on 7th March 2013, the Plaintiff argued that the application was dismissed through a ruling dated 28th November 2014. The Plaintiff's Counsel contended that the 5th Defendant who was on record at the time the 4th Defendant filed the application to have the suit dismissed did not file any submissions against or in support of the 4th Defendant's application.

The Plaintiff submitted that the Chief Land Registrar was the custodian of land ownership documents and that the 5th Defendant was sued on behalf of the Chief Land Registrar and also as the principal legal advisor to the government. The Plaintiff argued that the transfer in favour of the 4th Defendant was fraudulent and that the fraud was perpetrated through collusion between the 1st and 4th Defendant. It is the Plaintiff's submission that the fraudulent transfer of the suit property would only have been possible if there was collusion between the 1st, 4th and 5th Defendants and further, that the 5th Defendant had not made any serious denial of the said allegations.

Counsel for the Plaintiff further contended that the Plaintiff had tried in vain to apply for a restriction to stop the transfer of the suit property through various correspondences to the Chief Land Registrar. It is the Plaintiff's submission that the 5th Defendant had admitted that there was evasion of stamp duty in the transfer of the suit property which action was fraudulent and or criminal. The Plaintiff argued that in submissions dated 25th March 2011, the 5th Defendant stated that the transfer of the suit property in favour of the 4th Defendant which forms the foundation of this suit was riddled with *mala fides* and that the same was void.

The Plaintiff further submitted that the 5th Defendant had deponed that the transfer in favour of the 4th Defendant could not be relied upon to pass a good title. It was submitted that the 5th Defendant was therefore a vital player in this suit and that the said Defendant should allow the suit to proceed to trial for the issues to be determined on merit. Counsel submitted that the 5th Defendant could not claim that there was no reasonable cause of action against the Chief Land Registrar who registered the transfer between the 1st and 4th Defendants.

It is the Plaintiff's submission that the 5th Defendant had filed different submissions giving contradictive facts and that its allegation that the suit was frivolous, vexatious and scandalous were unfounded. Counsel averred that the Plaintiff's case was not weak beyond redemption and further, that dismissing the suit against the 5th Defendant before determination would be a draconian step.

The issue for determination is whether the Preliminary objection dated 4th November 2014 raises pure points of law. The Court of Appeal in the case of **Mukisa Biskuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969)EA696** described a preliminary objection inter alia as follows:-

"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 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."

In the amended Plaint dated 11th November 2010, the Plaintiff avers that the 5th Defendant is guilty of fraud for having registered the title without regard to her title and interest, acting in bad faith and causing the registration despite having notice of her claim. The Court must therefore ascertain the Plaintiff's claim before a determination that the suit does not disclose a cause of action against the 5th Defendant. Similarly, the Court ought to consider the pleadings and evidence before a determination that the Plaint as drawn against the 5th Defendant is frivolous, vexatious and scandalous can be made. The preliminary

objection dated 4th November 2014 does not raise pure points of law and requires the court to make a determination on facts which are in dispute. This can only be done after hearing the parties at the trial when the witness give evidence and are cross-examined. In the result I am not satisfied that the 5th defendant's application has merit and I order the same dismissed with costs to abide the outcome of the suit.

To facilitate the expeditions determination of the suit in keeping with the overriding objective of the courts to render justice expeditiously as they are enjoined under Section 1A of the Civil Procedure Act to do. I direct that the parties make full compliance with Order 11 of the Civil Procedure Rules within 60 days of this Ruling. The court in the premises fixes this matter for a pretrial conference on 9th June 2015.

Ruling dated, signed and delivered this.....**25th**.....day of.....**March**.....2015.

J. M. MUTUNGI

JUDGE

In the Presence of:

..... For the Plaintiff

.....For the Defendants