



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 29 OF 2020

ANTHONY MAINA MWANGI

CATHERINE WANJIRU.....PLAINTIFFS

PETER ANDIVA AYUYA

(Suing O/B LOVE MERCY PROJECT SELF HELP GROUP)

VERSUS

BEATRICE OLUOCH

JEMIMA OLUOCH.....DEFENDANTS

STEPHEN OMONDI OLUOCH

AND

THE SETTLEMENT FUND TRUSTEE.....1<sup>ST</sup> INTERESTED PARTY

THE ATTORNEY GENERAL.....2<sup>ND</sup> INTERESTED PARTY

RULING

**(On Interested Parties' Preliminary**

**Objection on the suit)**

**BACKGROUND**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties (referred to as the Interested Parties) brought a Preliminary Objection dated **02/10/2020**. The Defendants supported it. Before embarking on its analysis, it is appropriate to highlight some background information about the suit in order to give a better understanding of the issues, reasoning and final determination of the Preliminary Objection.
2. The Plaintiffs instituted a suit in this court vide a Plaint dated **20/5/2020** and filed on **22/5/2020**. They later amended it on **15/6/2020** and filed on **16/06/2020**. The amendment was based on directions given by the Court's own motion on **11/6/2020**. By the amendment, the Interested Parties were enjoined to the suit because the court's view was that their presence was necessary to enable it adjudicate this matter effectually and effectively.
3. When the matter came up for mention on the **13/10/2020**, learned counsel representing the parties recorded a consent to the effect that it was in agreement that the matter was a boundary dispute hence the necessity for a surveyor to be engaged to determine the boundaries between the suit parcels of land. The consent was adopted as the order of the Court. Thereafter, the order was to be effected and a surveyors' report filed in Court for consideration, after the exercise was conducted.
4. The parties embarked on the exercise and a report was filed in court on **13/10/2021**. However, the report which was dated **4/3/2021** was

contested by learned counsel for the Plaintiffs for reason of having indicated a different parcel number of land not among or one of those in dispute. The court ordered for its rectification. It was rectified and filed.

5. Again, the report was contested, this time around by the Defendants' learned counsel. He sought time to file an affidavit on the objection he had thereto. Whilst the Court was preparing to hear and determine the objection to be raised in respect of the surveyor's report, the instant Preliminary Objection was filed. By it, the Interested Parties prayed that the amended Plaint dated **15/6/2020** be dismissed *in limine* with costs.

### **THE PRELIMINARY OBJECTION**

6. I have indicated in **paragraph 1** of this ruling that the Preliminary Objection dated **2/10/2020** was brought by the Interested Parties and was supported by the defendants. It raised **three** grounds, namely:-

**1. That the amended plaintiff is incurably defective, misconceived, and an untenable and devoid of substance and the affidavit is full of misrepresentations of facts tailored to hoodwink this court**

**2. That the amended plaintiff is incompetent and untenable as the applicants *lack locus* to institute this (*sic*) proceedings.**

**3. That the amended plaintiff is an abuse of the court process as it attempts to usurp the jurisdictional mandate of constitutional bodies from carrying their statutory duties.**

### **DIRECTIONS**

7. On **10/11/2021** when the matter came up for mention to confirm whether that the Surveyors' report had been filed, it was learned counsel for the Defendants who brought to the attention of the court that there was a Preliminary Objection dated **2/10/2020**. Having moved the Court for it to be dispensed first, the Court directed that it be canvassed by way of written submissions. All the parties filed their respective submissions. In addition, on the **15/12/2021** they made short oral submissions highlighting the written ones. I will address them later in this ruling.

### **INTERESTED PARTIES' SUBMISSIONS**

8. The Interested Parties submitted that the preliminary objection fits within the definition of one as given in the cases of ***Mukisa Biscuit Manufacturing Company Ltd Versus West End Distributors Ltd (1969) E.A 696*** and ***Oraro Versus Mbaja (2005) 1KLR 141***. They submitted further that the Plaintiffs lacked the *locus standi* to institute the suit for reason that they were not registered as the owners of the parcels of land they claimed. On this, they contended that Plaintiffs alleged that the suit lands Nos. **347, 348** and **349** were registered under the Love Mercy Project Self-Help Group hence they lacked *locus standi* to institute the suit. They argued that the parcels of land were registered in other parties' names other than the Plaintiffs. Further, they contended that the issue was that parcel nos. **347** and **348** were still registered in the names of the Settlement Fund Trustees thus still Public Land and could not be deemed to have vested proprietary rights to a private individual. They submitted further that **Plot No. 349** was registered in the name of a third party. They thus submitted that the Plaintiffs were barred by **Section 26 (1)** of the Land Registration Act from bringing the instant suit.

9. Learned Counsel argued that if at all, the proprietary rights of the Plaintiffs over the suit lands had not yet materialized and that although the Plaintiffs may have bought the parcels, there was no evidence of registration of the parcels in their names or issuance of titles over them. Finally, they submitted that the Plaintiffs failed to prove that they had any registered rights over the suit parcels of land and that they indeed had bought the said parcels from the registered parties and that ownership was transferred to them as a prerequisite to move the court to protect those rights. It was for these reasons that learned counsel termed the suit an abuse of the process of the court for being incompetent, defective, misconceived, frivolous and vexatious. He urged the court to down its tools from entertaining the matter.

10. The defendants associated themselves to the Interested Parties' submissions. In addition, the defendants submitted that the Plaintiffs instituted the suit on the basis of sale agreements allegedly executed by vendors whom they had not enjoined and that failure to enjoin them was fatal and divested them of *locus standi* to sustain the suit against the defendants, and by extension the interested parties herein.

### **THE PLAINTIFFS' SUBMISSIONS**

11. Learned counsel for the plaintiffs submitted that a Preliminary Objection must be direct and admitted by both parties. They argued that the interested parties had not shown what was defective in the Amended Plaintiff. On the issue of lack of capacity to sue, counsel submitted that a Community Based Organization was not a legal entity therefore could not institute a suit in its name but through officials. She contended that the fact that the suit land was registered in the name of the Settlement Fund Trustees could not take away the Plaintiffs' rights to it. On the allegation of usurping constitutional mandate of the statutory bodies they submitted that the Interested Parties were enjoined to the suit through a court order which had never been appealed against by the Interested Parties. They then submitted that the interested parties were not protected from suits by virtue of being governmental bodies. They submitted that the interested parties had not demonstrated a pure point of law.

12. Regarding lack of *locus standi*, learned Counsel submitted that the interested parties were not clear about what they meant by it. She cited the case of ***Kipsiwo Community Self Help Group v Attorney general and 6 Others (2013) eKLR*** to fortify the point that the Plaintiffs had *locus standi* to institute the instant suit. She urged the court to dismiss the Preliminary Objection.

### **ORAL SUBMISSIONS**

13. On 15/12/2021, learned counsel for the Plaintiff made further submissions orally. On the defectiveness or otherwise of the suit for failure to join the vendors of the land, she referred the Court to **Order 1 Rule 9** of the **Civil Procedure Rules**. She stated that non-joinder or mis-joinder of parties should not defeat the suit. Therefore, she said that that did not render the suit fatal since it could be cured by an amendment.

14. In response, learned counsel for the Defendants stated that in the absence of title to the suit property and in so far as the Plaintiffs purported to draw their rights from parties not enjoined, **Order 1 Rule 9** meant that the Court had no substratum forming the rights of the Plaintiffs. They thus ought to be pronounced total strangers hence cannot enforce any rights against any parties in the suit.

15. Mr. Kuria, learned State Counsel, reiterated the Defendants' submissions. He submitted that **Order 1 Rule 9** could not cure the *lacuna* since the Plaintiffs failed to demonstrate that they had any registrable interest in the parcels of land. To him, they could not therefore seek to enforce rights yet to crystallize onto them.

## **DETERMINATION**

16. I have carefully considered the preliminary objection, the submissions by the parties as well as both the law and case law cited. Before I delve to determining the preliminary objection, I point out that I had difficulty in understanding the so called Preliminary Objection but I finally found what the parties meant by it. It is trite that a preliminary objection should be always on a pure point of law. But with due respect I find that in this case, the Interested Parties and Defendants raised nothing but purely evidential matters. The submissions thereto were to say the least a disappointment: they never clarified the issues the parties intended to raise. A party raising a preliminary objection ought to specify the law or provision of the law contravened by the other and clearly state how it has been breached.

17. In **Bashir Haji Abdullahi ...Vs...Adan Mohammed Nooru & 3 Others (2004)eKLR**, the Court held:

**“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the Preliminary points of law to be raised. To state that ‘the Application is bad in law’ without saying more does not assist the other parties to the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged”.**

18. I emphasize the point that a Preliminary Objection should be neither a point of conjecture nor a matter of evidence. It must be one that clearly flows from the pleadings and the law as they have an interplay. Any point that would call for proof of or is to be supported by facts or evidence and not purely the law cannot form a preliminary objection however well it may be clothed. It is either one or none. Where points fall outside the sphere of law they automatically drop without the delimitation given in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, where Law J A stated that:

**“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”, and further that “A preliminary objection raises a pure point to 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”.**

19. The meaning of a preliminary objection was further given in the case of **Oraro v Mbajja (2005) eKLR** where J. B. Ojwang J (as he then was) stated as follows:

**“I think the principle is abundantly clear. A Preliminary Objection, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual detail liable to be contested 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. I am in agreement... that where a court needs to investigate facts, the matter cannot be raised as a preliminary point.”**

20. Also in the **Supreme Court of Kenya in the case of Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** it stated as follows:-

**“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”**

21. Guided by the above cases, I find that the 1<sup>st</sup> and 3<sup>rd</sup> grounds of the Preliminary Objection are not preliminary objections properly so called. They are about factual matters: the Court shall and will be compelled to look further than they speak about the law that is alleged to have been breached in order to breathe more life into them. They call for evidentiary support or adduction of evidence. For instance, by the Interested Parties raised the point that the Plaintiffs do not own titles to the parcels of land in question, that does not flow from pleadings. To demonstrate that, I state that the law provides that for one to rightly claim land he has to prove ownership or show that he occupies it adversely to the owner. Proof of either of the two points the law provides that it requires production of evidence. Such a point then cannot be settled as a preliminary point of law. All that the Interested Parties raised about the ownership of the parcels in issue actually arose from and

through the annexures to the Affidavits that were in support and opposition to the application. Furthermore, the Interested Parties did not bring out clearly their arguments on how the above two grounds were pure points of law.

22. Regarding the 2<sup>nd</sup> ground of the preliminary objection, *locus standi* or lack of it is a point of law. I agree with them that lack of *locus standi* on the part of the Plaintiffs if proved would dispose the suit. However, in the instant point, it is not clear what exactly the Interested Parties argued amounted to the Plaintiffs' lack of *locus standi*. They attempted to address the issue in three ways. I will state each and comment on its merits or otherwise sequentially. *Firstly*, they argued that the plaintiffs lacked *locus standi* because they were not the registered owners of that land therefore could not bring a claim on land that belonged to Love Mercy Self Help Group. I stated above that registration of ownership of the parcels of land is a matter of evidence and not purely law. *Secondly*, they argued that the Plaintiffs lacked *locus standi* because the suit land is registered under Section 26 (1) of the Land Registration Act hence they could not institute a suit in respect to registered land when they do not have registrable interest in it. The provision cited is to the effect that a certificate of title once issued is held as conclusive proof of ownership unless it is proved to have been acquired by fraud or misrepresentation or illegally or by a corrupt scheme. It is clear that for one to bring himself within Section 26(1) he requires evidence of the validity or legality of the title he/she owns. Pleadings do not suffice. As to whether the acquisition was in line with the law is a matter of evidence. This cannot form the basis of a preliminary objection. *Thirdly*, they argued that the Plaintiffs lacked *locus standi* because even if they purchased the suit lands they have not yet been registered as the owners and therefore their proprietary rights over the suit lands had not crystallized. With due respect, this is a matter calling for adduction of evidence. As I draw close to the end of the analysis above about the failure by the Interested Parties to prove the Plaintiff's lack of *locus standi*, I repeat the definition of *locus standi* as was given in the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000. In the case, the Court held:-

**“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229, the Court also held that;-**

**“the term *Locus Standi* means a right to appear in Court and conversely to say that a person has no *Locus Standi* means that he has no right to appear or be heard in such and such proceedings”.**

23. Lastly, the Interested Parties challenged also the *locus* of the plaintiffs in bringing a suit on behalf of Love Mercy Project - a registered Community Based Organization (C.B.O.). Learned counsel for the Plaintiffs argued that they had locus to commence the suit on behalf of the CBO because it was not a legal entity and therefore a suit could only be commenced by or defended in that behalf through the officials or a representative suit. I agree with learned counsel. The provisions and process of registration of such entities as CBOs, Self-Help Groups and others in relevant Government offices does not confer separate legal entity status to such groupings. Further, in regard to authority to institute the suit, other members of the CBO are shown to have given it in writing to the Plaintiffs. Again, the Plaintiffs brought it out clearly in **paragraph 4** of the Plaintiff that they brought the suit on behalf of themselves and that of the rest of the members of CBO. As such there is no doubt that the Plaintiffs sued in their capacity as representatives of the rest. Regarding the law on filing of such suits, parties are referred to the case of **Kipsiwo Community Self Help Group v Attorney general and 6 Others (2013) eKLR**.

24. About the issue of joinder and non-joinder as submitted on **15/12/2021**, it is my considered view that the issue can be cured by amendment of the pleadings, at the appropriate stage. After all **Order 1 Rule 9** of the **Civil Procedure Rules** is clear that no suit shall be defeated by misjoinder or non-joinder of parties. To say the least, a party cannot be compelled by the Court or other party to sue parties they do not wish to. However, the ultimate consequences of non-joinder ought to be borne by a party who fails to join necessary parties to the suit.

## **CONCLUSION**

26. In the final analysis, this court finds that the preliminary objection was a trumpet blown in a vacuum. Its sound could not travel to reach those outside the vacuum as it did not travel in the first instance. It was absolutely baseless. It is dismissed with costs to the Plaintiffs.

26. For the purpose of case tracking, this case shall be mentioned on **06/04/2022** for issuance of further orders and directions. In the meantime each of the parties is given **only twenty-one (21) days** to prepare, paginate, bind and file its trial bundles which should be clearly indexed and the witness statements be cross-referenced with any documents they refer to. At the same time the parties should ensure that the copies of the documents they put in the bundles are clear, legible and none of their prints or writings are cut off.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**