



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 68 OF 2009

NJAU KABUE NJAU

CHEGE NJOROGE

NG'ANG'A NGUGI

PETER NG'ANG'A PLAINTIFFS/APPLICANTS

VERSUS

SAMUEL NGUGI WAITITU

PETER WAWERU SILANKE

SALANGA

J.W. SAYIORE

THE ATTORNEY GENERAL DEFENDANTS/RESPONDENTS

R U L I N G

1. By a **plaint** dated 19/3/2009, the Plaintiffs sued the Defendants seeking the following orders:
 1. **“Permanent injunction against the 1st, 2nd, 3rd and 4th Defendants barring them or their agents, employees and/or servants from interfering with LR. No. Kajiado/Oloolotikoshi/Kitengela/2989 or dealing with the said land in any manner.**
 2. **A declaration that the Plaintiffs are the legal owners of LR. No. Kajiado/Oloolotikoshi/Kitengela/22485 and that the District Land Dispute Tribunal ruling is null and void in view of the High Court judgment Civil Case No. 2375/1994 dated 12th June 2005.**
 3. **An order directed against the 1st, 2nd, 3rd and 4th Defendants directing them to surrender Title No. to Kajiado District Land Registrar for cancellation.**
 4. **An order directing the rectification of the register in respect of LR. No. Kajiado/Oloolotikoshi/Kitenga/22485 reverting the ownership to the 1st Plaintiff as trustee of Haraka Mengo Society.**
 5. **Mesne profits.**
 6. **Cost of this suit.**
 7. **Any other or further orders that this Honourable Court may deem fit and just to grant.”**

2. Simultaneously with the filing of the plaint, the Plaintiffs filed the **Chamber Summons** application dated 19/3/2009 seeking the following orders:

“1. (Spent).

2. That leave be granted to the Plaintiff do dispense with Statutory Notice to the Attorney General due to the urgency.

3. That this court be pleased to grant an interim injunction against 1st, 2nd, 3rd and 4th Defendants barring them from or their servants, agents and/or employees from transferring, trespassing and/or dealing with LR. No. Kajiado/Kitengela 22485 in any manner pending the hearing and determination of this application *inter partes*.

4. In the alternative to prayer (3) hereinabove, a declaration that the Kajiado District Land Dispute Tribunal order dated 24th February 2005 is null and void.

5. An order directing the District Land Registry as per the High Court decree dated 15th February 2005.

6. A temporary injunction to issue against the 1st, 2nd, 3rd and 4th Defendants, their agents and/or employees barring them from interfering, trespassing or dealing with LR. No. Kajiado/Kitengela 22485 in any manner pending the hearing and determination of this suit.

7. An inhibition do issue against title Number Kajiado/Kitengela 2989.

8. Costs of this application.”

3. On 21/5/2009, the application was certified urgent and prayer No. 7 allowed.

4. The 5th Defendant (Attorney General) entered appearance “under protest” and filed a **Preliminary Objection**. The **Preliminary Objection** is based on the following grounds:

“1. THAT the Plaintiffs have no *locus standi* to institute and or prosecute this suit.

2. THAT this suit offends mandatory provisions of Order 1 Rule 1 of the Civil Procedure Rules.

3. THAT this suit offends mandatory provisions of Order III Rules 1 (1), 1 (2) and 2 of the Civil Procedure Rules.

4. THAT this suit offends mandatory provisions of Order XXX Rule 1 of the Civil Procedure Rules.

5. THAT this suit offends mandatory provisions of section 13 A of the Government Proceedings Act, Cap 40 Laws of Kenya.

6. THAT this suit offends mandatory provisions of section 3 of the Public Authorities Limitations Act Cap 39 Laws of Kenya.

7. THAT this suit offends mandatory provisions of section 8 of the Land Disputes Tribunals Act, No. 18 of 1990.

8. THAT consequently the Honourable Court has no jurisdiction to hear and determine this suit.”

5. Although appearance was entered for 2nd – 4th Defendants, they did not participate in the **Preliminary Objection**. The 1st Defendant seems not to have entered appearance.
6. I have considered the pleadings herein, the **Preliminary Objection** and the written submissions filed by the Plaintiffs and the 5th Defendant. As stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd. -Vs- West End Distributors Ltd (1969) EA 696:-**

“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 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.”

7. One of the issues raised herein is whether the 1st Plaintiff filed a verifying affidavit as mandatorily required by **Order VII r.1 (2)** of the **Civil Procedure Rules**. Upon perusing the court record, I have not seen any verifying affidavit that has been filed by the 1st Plaintiff. However, the filing of a verifying affidavit is a matter of technicality that does not go into the substance of the matter. The 1st Plaintiff can therefore regularize and comply with the procedural requirements. (See for example **Grace Ndegwa & Others –vs- Hon. Attorney General C.A 228/2002**).
8. On whether the 2nd – 4th Plaintiffs have the *locus standi* to institute this suit, it is noted that paragraph No. 1 of the plaint describes the Plaintiffs as officials of **Haraka Mengo Society**. The 2nd – 4th Plaintiffs can therefore sue on behalf of the society. (See for example **Mahan Dhariwal, Chairman New Muthaiga Residents Assication & 2 Others –vs- Gemini Properties Ltd & Ano. (2009) e KLR**).
9. It has been argued on behalf of the 5th Defendant that this suit offends **section 13A** of the **Government Proceedings Act**. **Section 13A** of the **Government Proceedings Act Cap 40** provides as follows:-

“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”

10. The **Chamber Summons** application filed herein seeks leave that the court do dispense with the Notice to the Attorney General. It is therefore abundantly clear that no notice of this suit was served on the Attorney General. **Section 13A** of the **Government Proceedings Act** is coached in mandatory terms. Consequently no suit can be instituted against the Government before such a notice has been filed and the notice period has expired. The suit against the 5th Defendant is therefore incompetent. (See for example, **Kidayu Ole Lepet –vs-Kidayu Ole Lepet & 9 Others –vs- Nkuruna Ole Masikone & 11 Others (2005) e KLR**).
11. Although it was argued by the Plaintiffs that **Section 13A (3)** of the **Government Proceedings Act** does not apply to declaratory orders, prayer No. 3 and 4 of the plaint seek orders for cancellation and rectification of the register in respect of the suitland while prayer No. 5 seeks orders for *mesne* profits. These prayers cannot fall within the proviso of **section 13A (3)** of the **Government Proceedings Act** which provides as follows:-

“The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction”.

12. The other issue raised by the **Preliminary Objection** is whether the suit against the Defendant is

time barred as it offends **section 3** of the **Public Authorities Limitation Act Cap 39 Laws of Kenya**. **Section 3(1)** of the said **Act** provides as follows:-

“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

13.The Plaintiffs’ case against the 5th Defendant (Attorney General) is based on the alleged failure of the District Land Registrar to perform his statutory duty. My view of the Plaintiffs’ case against the 5th Defendant is that it is not based on tort and therefore the provisions of **section 3** of the **Public Authorities Limitations Act** do not apply.

14.The averments in the plaint is that the Plaintiffs were not party to the proceedings before the **Land Disputes Tribunal** which issued the orders complained about. It was further averred that the Applicants came to learn of the said proceedings in the year 2009. The arguments made by counsel for the 5th Defendant (Attorney General) that the Plaintiffs ought to have applied for Judicial Review or complied with **section 8** of the **Land Disputes Tribunal Act** which provides for appeals is not a matter that can be disposed of by way of a Preliminary Objection as there are facts that require to be ascertained.

15.Although the Plaintiffs’ suit has jumped some of the hurdles placed before it by the **Preliminary Objection**, the failure to serve the Attorney General with a Statutory Notice is fatal to the Plaintiffs’ suit. Although the suit against 1st – 4th Defendants does not face similar hurdles, without the 5th Defendant, sustaining the case against 1st – 4th Defendants would be in vain due to the intricate nature of the orders sought. The court cannot sever parts of the reliefs sought and leave others. As stated by the **Court of Appeal** in **Grace Ndegwa & Others –vs- Hon. Attorney General**;

“the court could not strike out parts of the reliefs sought and leave other parts. Neither could the court on account of the number of claimants strike out the case brought by some claimants and sustain other parts as some of the claimants....”

16.With the foregoing, I strike out the Plaintiffs’ case with costs to the Defendants.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of September, 2014.

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B. THURANIRA JADEN

JUDGE