



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 284 OF 2012

JOSHUA M. WAMBUA & 12 OTHERS PLAINTIFFS

- VERSUS -

PHILEMON MWAISAKA & 5 OTHERS DEFENDANTS

RULING

Mr. Wameyo Learned Counsel for the defendants raised a Preliminary Objection on issues that he said were uncontested. According to him the uncontested facts were that this suit was about LR/MN/III/515. That this is what was pleaded on the plaint. Further that the affidavit of Joshua M. Wambua sworn on 3rd December, 2012 supporting the notice of motion of the same date said the same.

He argued that the first annexure to the said motion is a copy of the title deed. That on the said title deed are entries of 14th January, 2010 showing new title numbers were issued on subdivision of title no. LR/MN/III/515 and that on the copy of the title annexed the motion, are writings

"Titles closed on subdivision now 4117, 47118, 47119, 47120, 47121 and 47122A".

His argument therefore, is that the subject matter of the suit has been extinguished. That therefore the Court cannot make orders on a property which does not exist. Further that those orders sought by the applicants cannot be registrable in the land office. That this is an exercise in vain.

Finally Mr. Wameyo argued that the applicant is trying to stop the respondent from subdividing his property which act has already been done. That prayer No. B is misplaced because the injunction orders are in respect of a property that does not exist.

Mr. Gekonde Learned Counsel for the applicant opposed the Preliminary Objection. He argued that any Preliminary point must be pleaded. He said that the applicant has not filed a defence. That no replying affidavit has been filed either. That the defendants therefore have not contested the case. He argued that the writings on the copy of the title exhibited in Court is not from the land office. That the easiest way to show whether a property is intact or subdivided is by doing a search in the land office which Mr. Wameyo's client were free to do. Mr. Gekonde argued that these were contested facts and could only be canvassed at the trial. He relied on **Mukisa Biscuits Manufacturing Co. Ltd -vs- Westend Clothing [1968] EA Page 296.** He also relied on the **Njoya - vs- 6 Others** which restated the position taken in **Mukisa Biscuits** aforesaid.

I have carefully perused the title LR Number MN/III/515. The last recording was done on 14th January 2010. The same reads

"issue of new title CR.NO. 27116 in respect of subdivision 5527 Reg. No. 2875-79 Section III MN area owner Philemon Mwaisaka"

Signed.

Below this entry there is an unsigned writings as follows;

"Title closed on subdivision now 47117, 47118,47119, 47120, 47121 x 47122"

against these writings are no signatures.

This is the bone of contention of the Preliminary Objection. The respondent has denied that this is a genuine recording from the land office. From my reading of the plaint and the affidavit of Joshua M Wambua supporting the motion dated 3rd December 2013, I can see no express statement that the land subject matter to this suit has been subdivided and/or extinguished. In any case, these issues can only be canvassed and ventilated in court through adducement of evidence. These are not the kind of issues that are envisaged in a Preliminary Objection. They are clearly not within the ambit of a Preliminary Objection as set out in **Mukisa Bisquit** case at all.

I do not think it would be prudent to strike out this suit for the reasons given.

Article 159 (d) of the Constitution says that justice shall be administered without procedural technicalities, this suit should be heard so that the real issues between the parteis can be determined.

The preliminary objection is dismissed with costs to the applicant in the motion dated 3rd December, 2012.

Dated and delivered in open Court at Mombasa this 27th day of June, 2013

S.N.MUKUNYA

JUDGE

27.6.2013