



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 336 OF 2013

DAHIR MUHAMED BURALE.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MAVOKO.....1ST DEFENDANT

ST JOSEPHS CATHOLIC CHURCH.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

RULING

The plaintiff/applicant approached this court vide a Notice of Motion dated 8th March 2013 filed on 11th March 2013 under **Order 40 Rules 1,2,3 and 4 of the Civil Procedure Rules and Section 1A,1B and 3A of the Civil Procedure Act** seeking for injunctive orders against the defendants/Respondents. On 11th March 2013 the Court granted the plaintiff/applicant prayer 2 of the application which is a temporary injunction restraining the defendants from evicting the plaintiff and or trespassing, charging, alienating, sub dividing however and whatsoever from dealing, selling and or committing acts of waste in LR No 26699/29/12 and LR No 26699/29/13. This interim order is still in place.

However when the application had been set down for hearing the 1st Defendant filed a preliminary objection dated 8th April 2013. The preliminary objection is based on the following grounds:-

- a. That the application dated 11th March 2013 is fatally defective as against the 1st Defendant/Respondent and should be struck out with costs.
- b. That the office of the 1st Defendant /Respondent ceased to exist by virtue of the repealing of the **Local Government Act** by the County **Government Act section 134 (1)** upon the final announcement of all the results of the 1st Elections held under the Constitution, 2010.
- c. That the first elections under the Constitution of Kenya 2010 were held on 4th March 2013 and as the result were declared on or about 9th March 2013 whereas the suit was filed on 11th March 2013.
- d. That the office of the 1st Defendant also ceased to exist by virtue of section 31 of the **Urban Areas and Cities Act No 13 of 2011** which came into force after the first elections held under the Constitution of Kenya 2010.
- e. That **Section 55 of the Urban Areas and Cities Act No 13 of 2011** provided that all rights assets

and liabilities accrued in respect of the properties vested in the local authorities established under the Local Government Act shall stand repealed after the first election under the Constitution shall be dealt with as provided by the law.

A second preliminary objection dated 20th May 2013 was filed by the 2nd Defendant/Respondent on the grounds that:-

1. The plaintiff/applicant's application dated 8th March 2013 is fatally defective as against the 2nd Defendant and should be struck out accordingly with costs.
2. That while the second defendant/Respondent is the rightful owner and proprietor of the land LR No 26699/29 with a title deed the plaintiff's application dated 8th March 2013 seeking temporary injunction to be issued to restrain the defendants from dealing, selling and committing acts of waste on LR No 26699/29/12 and LR No 26699/29/13 ought to fail for non-disclosure as the plaintiff/applicant has not disclosed to this court any legal title as required by law and practice.
3. That the plaintiff/applicants application dated 8th March 2013 seeking temporary injunction to be issued to restrain the defendants from dealing, selling and committing acts of waste on LR No 26699/29/12 and LR No 26699/29/13 which suit land does not exist as the only land that is known as such is LR No 26699/29 and therefore the suit is filed in bad faith and consequently amounts to an abuse of the court process.

The parties agreed to file written submissions. The first defendant/respondent filed its submissions on 11th July 2013 and submitted that the issue this court is to determine is whether at the time of filing the suit on 11th March 2013 the 1st defendant existed and relied on **section 134(1) of the County Government Act No 17 of 2012** which stipulates that ***"The Local Government Act is repealed upon the announcement of all the results of the first elections held under the Constitution"***. Subsection (2) of the same section states that ***"All issues that may arise as a consequence of the repeal under the subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition"***. The 2nd defendant further submitted that the elections were conducted on 4th March 2013 and the final result announced on 9th March 2013 two days after the Act that establishes the 1st Defendant being the **Local Government Act** had been repealed. The 1st defendant /Respondent further submitted that **section 1(3) of the urban areas and Cities Act No 13 of 2011** provides that the transition provisions of the Act shall come into operation on the repeal of the **Local Government Act**. However; the 2nd defendant did not make any submissions on the 2nd Defendant's preliminary objection.

The 2nd Defendant/Respondent filed its submissions on 16th July 2012 made its submissions basing on the grounds earlier raised and submitted that the plaintiff is guilty of material non-disclosure of facts in that the plaintiff sought and obtained ex parte orders without disclosing to the court that they did not have a valid title to the suit property and as a result the plaintiff/applicant does not have the right to sue. That the plaintiff/applicant was issued with an allotment letter and not a title therefore the plaintiff was a trespasser in its property. The 2nd Defendant /Respondent relied on the case of **R-vs. Kensington Income Tax Commissioner EP Princess Edmond De Polignac (1917)1 KB 486** which was granted with approval in the case of **Rose Wakuthi Njunu (Administrator of the Estate of the Late Julius W. Mwangi Njunu)-vs- Edward Githinji & 2 others (2006) e KLR** where it was held that ***"It is perfectly well settled that a person who makes an ex parte application to the court in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and he does not make that disclosure then he cannot obtain any advantage he may have already obtained by him."*** It also relied on the case of **Owners of the Motor Vessel "Lillian S" -vs- Caltex Oil (K) Limited [1989]KLR** where it was held that , ***"It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the court of the facts known to the applicant and failure to disclose may result in the discharge of any order made upon the ex parte applicant application"***

The 2nd defendant also submitted that the applicants application dated 8th March 2013 is fatally defective, bad in law and therefore an abuse to the court process as the pleadings show that the suit premises LR No 26699/29/12 and LR No 26699/29/13 do not exist as the rightful owner of the property is the 2nd defendant making the plaintiff a trespasser on the 2nd defendant's property. The 2nd Defendant relied on the case of **Wreck Motor Enterprises –vs Commissioner of Lands and Anor Civil Appeal No 71 of 1997** where the court held that, ***“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting conditions stated in such a letter and actual issuance of title document thereafter”***

On the 1st defendant/respondents preliminary objection, the 2nd defendant/respondent submitted that the suit against the 1st Defendant should be dismissed on the basis that the 1st defendant does not exist in law by virtue of the repealing of the **Local Governments Act** and quoted **section 134** of the **County Government Act No 17 of 2002** which provided that:-

1. The **local government Act** is repealed upon the final announcement of all results of the first elections held under the constitution.
2. All assets that may arise as a consequence of the repeal under subsection (1) above shall be dealt with and discharged by the body responsible for matters relating to the transition and submitted that the body contemplated is the Transition Authority. It also relied on **section 55 of the Urban Areas and Cities Act No 11 of 2013** and submitted that the 1st Defendant ceased to exist when the statute that created it was repealed therefore the 1st Defendant does not exist in law and cannot be sued.

The plaintiff filed his submission on 30th July 2013 and submitted that the 1st Defendant's preliminary objection dated 8th April 2013 is misconceived and incompetent on the grounds that under part Vii which is a transitional clause that the provision of **Urban Areas and Cities Act No 13 of 2011** clearly answered the 1st Defendant and **section 58 (1)** states that any act matter, thing lawfully done by an local authority before the commencement of this **Act** and any contract arrangement, agreement, settlement, trust, bequest, transfer, division, distribution or succession affecting any service delivering trade of any form sale or dealings on land or any other matter affecting assets, liabilities or property belonging to any local authority whether movable or immovable shall unless and until effected by the operation of this **Act** continue in force and be vested in a body established by law. Further **section 59** of the **Act** stipulates that any legal right accrued cause of action commenced in any court of law or tribunal established under any written law in force or any appeal or reference howsoever filed by or against any local authority shall continue to be sustained in the manner in which they were prior to the commencement of this **Act** against a body established by law.

The plaintiff submitted that a transition had been defined as the period between the commencement of the **Act** and three years after the 1st elections therefore the suit is properly before the court as against the 1st Defendant.

On the 2nd Defendant's preliminary objection dated 20th May 2013 the plaintiff submitted that no facts particularly those that are or may be in contest is allowed to be referred to. The court cannot look at any evidence when considering the preliminary objections for purposes of preliminary objection on points of law it is deemed that the statements or allegations of facts made by the plaintiff are correct or admitted. The plaintiff submitted that his claim as the legal owner of the suit property is a question of the fact which is the subject to prove which is yet to be determined by this court. The plaintiff relied on the case of **Mukisa Biscuit Manufacturing Co Ltd –vs- West Ed Distributors (1969) EA 696** where the court held that ***....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....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". The plaintiff submitted that will need to show how the plaintiff came to own the plots and build the land and how the 1st Defendant had obtained the property. The preliminary objection argued does not pass the test. The preliminary objection does not raise a pure point of law.

ISSUES FOR DETERMINATION.

The issues this court needs to look at is whether the 1st and 2nd defendants merit the prayers they have raised in the preliminary objection.

In the 1st Defendant's preliminary objection raises the issue that as at the time this suit was filed the 1st defendants office was non existent by virtue of the repeal of the Local Government Act and the Act that came into force is the County Government Act .It the 1st Defendant's argument that after the elections they ceased to exist and that this suit was filed in court two days after the repeal of the Local Government Act therefor the plaintiff has sued a non existent entity. The 1st Defendant relied on **section 134 (2) of the County Government Act No 17 of 2012**. It also relied on the **section 55 of the Urban areas and Cities Act No 13 of 2011** where it stated that all rights, assets and liabilities accrued in respect of the properties vested in the local authorities established under the local government Act which shall stand repealed after the first election under the constitution shall be dealt with as provided as provided by law. The plaintiff on the other hand submitted that there is a transition clause under part VII of the Urban areas and **Cities Act** and more so **section 58(1)** which states that any act matter, thing lawfully done by an local authority before the commencement of this Act and any contract arrangement, agreement, settlement, trust, bequest, transfer, division, distribution or succession affecting any service delivering trade of any form sale or dealings on land or any other matter affecting assets, liabilities or property belonging to any local authority whether movable or immovable shall unless and until effected by the operation of this Act continue in force and be vested in a body established by law.

section 59 of the **Act** stipulates that any legal right accrued cause of action commenced in any court of law or tribunal established under any written law in force or any appeal or reference howsoever filed by or against any local authority shall continue to be sustained in the manner in which they were prior to the commencement of this Act against a body established by law.

Section 59 is very clear in that any reference filed by or against any local authority shall continue to be sustained in a manner in which they were prior to the commencement of this Act against the body established by law. But this section deals with actions that were there prior to the repeal of the Local Government Act.

Under the **Urban Areas and Cities Act** transition period has been defined to mean the period between the commencement of this Act and three years after the first General elections.

The three year transition period has adequately covered the suits that will be filed for and against the 1st Defendant. Moreover, the county council of Mavoko has a successor and assign that has taken over its function after the elections namely Machakos County Government. However the non joinder of this entity cannot defeat the plaintiffs claim. Secondly the loopholes in the Urban Areas and Cities Act cannot be said to defeat the plaintiffs claim as the actions complained of emanated through the deeds of the 1st Defendant.

The 2nd defendant's preliminary objection is based on the claim that the plaintiff does not possess a title but an allotment letter and therefore the 2nd defendant's contention is that the plaintiff should have disclosed to the court that it is holding a letter of allotment and not a title. This argument amounts to matters of fact that need to be proved in court. The court has to interrogate how both the title being held by the 2nd defendant and the letter of allotment being held by the plaintiff were procured and this can only be determined in the hearing .It is therefore not a point of law but a statement of fact. I therefore dismiss the two preliminary objections with costs.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 15th DAY OF

November 2013

MARY M. GITUMBI

JUDGE