REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 108 of 2011

1. MARY S.MUSAU

2. PAUL KIMANI MUSAU

3. ELIJAH MUTUA MUSAU...PLAINTIFFS

VERSUS

1. SOLI MUSAU

2. KALIMA MUSAU...DEFENDANTS

RULING

The suit was scheduled for hearing before me on 7th May, 2012. On that day however, **Mrs Nzei,** Learned Counsel for defendants indicated that she wished to raise a Preliminary Objection to the suit. Indeed in the joint statement of defence dated 21st January, 2004 and filed earlier the defendant had put the plaintiff on notice that at hearing of the suit, they would be raising a preliminary objection to the effect that the suit was incompetent. Parties agreed to argue the Preliminary objection first. They also agreed to do so by way of written submissions. Those submissions we subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

The genesis of this dispute is of course this suit which was filed by the plaintiff against the defendants on 19th December, 2003. The plaint was subsequently amended on 7th March, 2008. By this amended plaint, the case for the plaintiffs is that the 1st plaintiff is the registered proprietor of all that piece or parcel of land numbers 42220 and 4221 situate in Miumbuni/Ngoleni Adjudication Section of Machakos, "*the suit premises*". The plaintiffs were awarded the suit premises during the objection proceedings during land adjudication and upon the defendants' Appeal No. 217 of 1999 to the Minister for Lands being dismissed. Nonetheless the defendants had trespassed on the suit premises by uprooting sisal plants forming the boundaries, cutting down trees, burning charcoal, cultivating and committing other acts of waste on the suit premises. They also averred that the appeal having been heard by the Minister, consent to commence this suit was no longer a legal requirement. They therefore prayed for a permanent injunction against the defendants as well as their eviction from the suit premises.

The defence of the defendants was to the effect that the suit was incompetent, fatally defective and bad in law since no consent was sought and obtained pursuant to section 30 of the Land Adjudication Act. They further averred that the 1st plaintiff was their step-mother, whereas the 2nd and 3rd plaintiffs were her sons and therefore their stepbrothers. During Land Adjudicating in the area, the plaintiff filed

objection against **Kyalo Kyeu** claiming a portion of land parcel No. 1034. The objection was heard all through the stages until the minister for lands on appeal. However, **Kyalo Kyeu** was long deceased. To the defendant therefore the proceedings before the Land Adjudication Officer and the Minister for Lands were a nullity on that account. They also averred that the plaintiffs who had since 1953 resided in another family land in Yatta had wrongly and unlawfully caused the defendants' land parcels so combined with those belongings to the 1st plaintiff in or about the year 2003. The defendants intended to raise an appropriate counter-claim. However, this was not to be as when the suit came before me for hearing as aforesaid, no such counterclaim had been raised.

The preliminary point of law raised by the defendants is to the effect that this suit is incompetent for want of consent from the Land Adjudication Officer before its inception in terms of the mandatory provisions of section 30 of the Land Adjudication Act. The plaintiffs counter this by saying once the appeal was determined by the minister for land in terms of section 29(3) of the same Act and therefore no consent was required.

From the outset, let me say that for a Preliminary Objection to be successful, it has to first pass the test provided in the classic case of **Mukisa Biscuits Co. vs West End Distributors [1969] E.A. 696**. The objection ought to be capable of disposing off the matter in *limine* without the court having to delve into facts. It should also be based on pure points of law and argued on the basis that the facts are agreed. In my view and contrary to the submissions of the plaintiff, objection taken is on a pure of point of law; and if upheld, is capable of determining the fate of the suit. The issue raised does not require further investigations by way of evidence. It has been raised in the pleadings and turns on the interpretation of sections 29 and 30 of the Land Adjudication Act.

Those sections are in these terms-

"***29 (3) When all the appeals have been determined, the Director of Land Adjudication shall-***

a. Alter the duplicate adjudication register to conform with the determinations, and

(b) ***Certify on the duplicate adjudicating register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication, register accordingly.***

30. (1) Except with the consent in writing of the Adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act."

My own reading, interpretation and understanding of the above provisions of the law is that as long as the adjudication register for that adjudication section has become final and a certificate to that issued by the adjudication officer, no person can initiate and this court has no jurisdiction to entertain a suit emanating from the adjudication section touching on interest in land resulting from the ongoing adjudication unless the adjudication officer has consented to the suit in writing. The issue here therefore is whether the adjudication Register for Miumbuni/Ngoleni Adjudication section has been made final and a certificate in that regard issued. Both parties are in agreement that the adjudication section has yet to be made final. If the contrary was the case, the plaintiff would have pleaded so.

With regard to section 29(3) aforesaid, it is abundantly clear that once appeal is determined, the Director of Land Adjudication is supposed to do certain things to bring the register to a close. Once this is done, then there will be no need for consent. It was upto the plaintiffs to say so. They did not. The plaintiffs cannot expect this court to assume that the decision of the minister on appeal was passed on the Director of Land Adjudication who in turn altered the duplicate adjudication register and later certified it as having become final. What is common ground is that Adjudication register for Miumbuni/Ngoleni Adjudication Section was still open. Indeed the Land Adjudication Officer who was in court on 7th May,

2012 when the case was scheduled for hearing, confirmed when asked by court, that adjudication in the area was still ongoing. Accordingly the plaintiffs attempt to seek refuge in section 29 (3) is in vain.

The Plaintiffs in the premises ought to have obtained the Land Adjudication Officer's consent prior to the filing of this suit as mandatorily provided for under section 30 of the land Adjudication Act. The Plaintiffs have admitted that they did not. The foregoing being the position, it follows that this suit is incompetent. Accordingly, it is struck out with costs to the defendants

RULING DATED, **SIGNED** and **DELIVERED** at **MACHAKOS,** this **30TH** day of **JULY**, 20**12**.

ASIKE-MAKHANDIA
JUDGE