



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Environmental & Land Case 230 of 2009**

**KARTAR KUMAR MATHARU**

(the legal representative of the Estate of the late

**SOHAN SINGH MATHARU Deceased ..... 1<sup>ST</sup> PLAINTIFF**

**BHUPINDER SINGH MATHARU ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MICHAEL MAINA NJOROGE ..... 1<sup>ST</sup> DEFENDANT**

**EDWARD NJUGUNA KANG'ETHE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

At the centre of this suit is a property known as LR. No.209/2489/34 situate in Nairobi. In the Chief Magistrate's Civil Case No.6723 of 2008, Michael Maina Njoroge vs. Sohan Singh s/o Danga Singh the lower court issued a break in order and that the 1<sup>st</sup> Defendant be placed in possession.

The plaintiffs herein then moved to this court for the following orders:

1. **That the Honourable Chief Magistrate's court had no jurisdiction to make the orders which it made by virtue of section 2 of the Registration of Titles Act (Cap.281) Laws of Kenya.**
2. **The entire suit filed in the Honourable Chief Magistrate's Court was a non-starter.**
3. **The orders were obtained by misrepresentation, fraud and by tendering perjured and fabricated evidence.**
4. **The defendant in the said matter passed away on 9<sup>th</sup> January, 2000 hence could not have instructed an advocate to handle the suit and record the consent orders alleged.**

The prayers sought in this suit are that:

1. **An injunction be issued against the defendant or his agents and servants from entering upon, or trespassing on the suit property whatsoever, and interfering with the defendant's right to quietly possess the same.**
2. **A declaration that orders granted in CMCC No.6723 of 2008 on 27<sup>th</sup> February, 2009 and 2<sup>nd</sup> April, 2009 are null and void.**
3. **Alternatively an order that the defendant's name and that of Edward Njuguna Kang'ethe, are cancelled from the Land Register as owners of the suit property.**
4. **A declaration that the plaintiffs have been and are the only lawful proprietors of the suit property herein described; and**
5. **A declaration that the purported conveyance of 16<sup>th</sup> March, 2007 and any other subsequent transaction in favour of the defendant and one Edward Njuguna Kang'ethe are of no legal effect.**

The said plaint was subsequently amended but the thrust of the orders remained the same.

The 1<sup>st</sup> defendant, Michael Maina Njoroge filed a Notice of Preliminary Objection. In that objection, it was alleged that the Chamber Summons and the Plaint were fatally defective and incompetent, and should be struck out and dismissed with costs.

The reasons therefor are that:

1. **Thirty days statutory notice prior to institution of this suit was never served upon the defendant as required under section 136(2) of the Governments Land Act (Cap.280) of the Laws of Kenya.**
2. **The plaintiffs' cause of action in fraud did not accrue within one year next before the commencement of this action and is barred by Section 136(1) of the Government Lands Act (Cap.280) Laws of Kenya.**
3. **The Commissioner of Lands has not been enjoined in this suit.**

Subsequently, Edward Njuguna Kang'ethe was joined as the 2<sup>nd</sup> defendant. In his Statement of Defence and in particular, paragraphs 8 and 9, he seems to join issues with the 1<sup>st</sup> defendant in respect of the preliminary point and argues that the plaintiffs' claim is incompetent as he obtained title to the suit property upon transfer for value from the 1<sup>st</sup> defendant, and therefore his title is not subject to any challenge in view of the provisions of Section 23 and 24 of the Registration of Titles Act (Cap.281) Laws of Kenya.

He also submits that the plaintiffs' claim is incompetent as the Commissioner of Lands has not been enjoined in the suit.

Counsel on record agreed that the preliminary objection should be argued first and they have accordingly filed skeletal written submissions in addressing the same.

I have gone through the said submissions and several authorities that have been cited by the counsel appearing for the parties. It is the plaintiffs' case that they are properly before the court and that the property herein is not governed by the Government Lands Act aforesaid but by the Registration of Titles Act Cap.281 Laws of Kenya. It is also their case that, fraud having been alleged, the same cannot be addressed by way of Notice of Preliminary Objection and a full trial is called for in the circumstances of this case.

In the case of Mukisa Biscuit manufacturing Co. Ltd. Vs. Westend Distributors Ltd. [1969] EA 696 at page 700 Law, J.A stated as follows:

**“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 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 contract giving rise the suit to refer the dispute to arbitration.”**

At page 701, Sir Charles Newbold P stated as follows:

**“A preliminary objection is in the nature of what used to be a demurrer. It raised 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 improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”**

I have related the pleadings herein to the Preliminary Objection raised. Most of the matters canvassed by the counsel appearing go to the root of the main trial the issues of which cannot be determined by preliminary objections. Whether or not this property is governed by the Government Lands Act or by the Registration of Titles Act is a question of evidence and fact that cannot be determined at this stage. Whether or not there was fraud and forgery is also a matter of fact that cannot be determined at this stage.

There is yet another matter; whether or not the 1<sup>st</sup> defendant had a clean title to transfer to the 2<sup>nd</sup> defendant. This again is an issue that can only be determined during the trial. I do not wish to delve any deeper into the submissions so filed because, to do so is likely to prejudice the cases of all the parties herein, the plaintiffs and the defendants in equal measure. I can only comment that, the raising of this preliminary objection is likely to delay the hearing of this matter. Having said so, I hereby dismiss the notice of preliminary objection and

order that proceedings shall now move the next stage to prepare for the main hearing.

I have noted that, the pleadings are now closed. The parties should now comply with Order 10 Rule 11A of the Civil Procedure Rules and agree on the issues for determination so that this matter may be heard on merit. The plaintiffs shall have the costs occasioned by the preliminary objections.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of February, 2010.*

**A. MBOGHOLI MSAGHA**  
**JUDGE**