



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Case 62 of 2008**

**M'IKIARA M'RINKANYA ..... 1<sup>ST</sup> PLAINTIFF**  
**SEBASTIAN NYAMU ..... 2<sup>ND</sup> PLAINTIFF**  
**VERSUS**  
**GILBERT KABEERE M'MBIJIWE ..... 1<sup>ST</sup> DEFENDANT**  
**COUNTY COUNCIL OF MERU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

Both the plaintiffs in this suit claim that the 2<sup>nd</sup> defendant in 1971 allocated to them plot number 58 Nkubu. They each occupied their own portion of that plot being 58'A' and 58'B". They aver in their plaint that they have erected on those plots permanent commercial premises. The 1<sup>st</sup> defendant sued the plaintiff in HCC Meru 115 of 1979 seeking their eviction. Judgment was granted in favour of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not execute that judgment within the 12 years provided under the Limitation of Actions Act and on an appeal by the plaintiffs in this case the Court of Appeal barred the first defendant from executing that judgment. The 1<sup>st</sup> defendant responded to that order of the Court of Appeal by filing HCC Meru No. 89 of 2007. In that case, he sought the declaration that he owned plot number 58 Nkubu. Whilst the plaintiffs waited for the defendant to proceed with that action, they received notification from the first defendant that he had obtained 99 years' lease over plots number 33 and 34 Nkubu. Those two plots, the first defendant claimed were located where plot 58"A" and "B" Nkubu are. That notification prompted the plaintiff to file this present case. In this case, the plaintiff seek firstly, a declaration that they are the lawful allottees of plots number 58"A" and "B" Nkubu Market. They also seek a declaration that plots number 33 and 34 are not legally located on the same ground as plot number 58"A" and "B". Secondly, the plaintiff seek a declaration that the lease over plots number 33 and 34 are null and void. Thirdly, the plaintiff seeks permanent injunction to restrain the defendants, their servants and agents from evicting, entering or whatsoever interfering with plots number 58 "A" and "B" claiming that it is on plots number 33 and 34. From that pleading, one will note that the plaintiffs are alleging that plots number 33 and 34 which the 1<sup>st</sup> defendant alleges the plaintiffs occupy is not where plots number 58"A" and "B" are. The plaintiff then seeks for declaration that the leases over plots number 33 and 34 are null and void. The 1<sup>st</sup> defendant has raised a preliminary objection to this suit. That objection is in the following terms:-

*(a) That the grant issued to the respondent in respect of Plot Nkubu Market 33 and Nkubu Market 34 herein confers an absolute and indefeasible title to this properties and is subject to no other interests than those mentioned in the grant pursuant to provisions of Section 27, 28 and 30 of the Registered Land Act, Cap 300 of Kenya.*

*(b) That from the date of the grant in the certificates of lease issued herein all other interests in the suit property were extinguished and the only interest recognizable by the law are those mentioned in the grant."*

The 1<sup>st</sup> defendant's argument is that before the leases were issued to him by the 2<sup>nd</sup> defendant, the land where the plots number 33 and 34 are was trust land as per Trust Land Act Cap 288. However, it was argued by the 1<sup>st</sup> defendant once the leases were issued to him, as per section 27, Section 143 and Section 30 Registered Land Act, he attained absolute ownership which ownership cannot be defeated. Section 27 (a) and (b) provides as follows:-

“27. Subject to this Act

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

The 1<sup>st</sup> defendant continued to argue that the leases granted to him extinguished all other interests in that land. He argued that Section 116 of the Constitution of Kenya provides that land registered under R.L.A. cannot revert to trust land. The 1<sup>st</sup> defendant therefore said that this court has no power to cancel the title issued to him because that would be tantamount to reverting the land to trust land. Section 143 R.L.A. provides that first registration cannot be rectified. It was contended by the first defendant that the leases issued to him were first registration. In support of his submission, the first defendant relied on various cases.

1. CIVIL APPEAL NO. 39 OF 1989 KISUMU, MUGOGO VS. SIHOWA(1988) KLR.

The court held:-

1. Under the Registered Land Act (Cap 300) Section 143, the court may order rectification of the register by directing that registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

2. There was no evidence or fraud or mistake in this case and even if fraud were established, the respondent's title could not be defeated inasmuch as it was acquired by a first registration.

2. HIGH COURT NO. 759 OF 1971 NAIROBI, AMBALE VS MASOLIA (1986) KLR.

The court held:

1. There was no doubt that the registration of the land in the name of the church was a first registration under the Registered Land Act (Cap 300).

2. From the plaintiff's pleading, there was nothing to suggest that the plaintiff had taken the steps provided for an aggrieved person in the procedure before a first registration.

3. On a proper construction of section 143 of the Registered Land Act, even if the alleged fraud or mistake was shown, the title of the church was infeasible.

4. The suit was improper and misconceived and could not be brought against the defendant.

3. CIVIL APPEAL NO. 1647 OF 1984 NAIROBI, GATHIBA VS. GATHIBA (KLR (E & L)1

The court held:-

“A first registration by virtue of section 143(1) of the Registered Land Act should not and cannot be rectified as section 143(1) preventing such rectification is mandatory and absolute.”

The 1<sup>st</sup> plaintiff by his affidavit dated 23<sup>rd</sup> June 2008 stated thus:-

“That court will note that all the documents attached demonstrating the conversion of plots No. 58 to No. 33 and 34 were all made between February 2008 and after appeal No. 124 of 2003 stopped 1<sup>st</sup> respondent from taking plot no. 58 Nkubu.”

The law relating to a preliminary objection is that an objection is raised on a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained. See the case of Mukisa Biscuits Co. Ltd Vs. Westend Distributors [1969] E.A as per Charles Newbold P. First defendant should have argued his Preliminary Objection on the basis that he accepts all the facts as pleaded by the plaintiff as correct. The plaintiff's pleadings amongst others are that plots number 33 and 34 are not located where plots number 58“A” and “B” are to be found. That being so, the very forceful and eloquent argument by the first defendant's counsel that the 1<sup>st</sup> defendant's title being the first registration could not be defeated falls to the ground in the light of that pleading. What the plaintiffs are

inviting the court to do in this case is to determine whether the leases given to the first defendant can be located where plot number 58"A" and "B" are. The pleadings also seem to suggest that the plaintiffs are seeking to litigate their right as envisaged by Section 30 (g) R.L.A. The plaintiffs have, after all, sought a permanent injunction stopping the first defendant evicting them from plot number 58"A" and "B". For those reasons, the first defendant's preliminary fails and is dismissed with costs being awarded to the plaintiff as against the 1<sup>st</sup> defendant. Having reached that decision, the plaintiff's application dated 5<sup>th</sup> February 2009 shall proceed for hearing. In the meanwhile, I order that the interim orders be issued in terms of prayer number 3 of that Notice of Motion dated 5<sup>th</sup> February 2009 until further orders of this court.

Dated and delivered at Meru this 12<sup>th</sup> March 2010.

**MARY KASANGO**  
**JUDGE**