



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 75 of 2009

1. NANCY WAIRIMU NJAU

2. GEOFFREY NJAU MUNGAIPLAINTIFFS

VERSUS

1. JOSEPH OKEMWA ONTWEKA

2. DICKSON NDECHU GATONGO

3. MRS MICHAEL NJUGUNADEFENDANTS

RULING

1. Before me is a Preliminary Objection by the Defendants herein. It is dated 23.10.2009 and is worded thus;

“(a) The Plaintiffs having filed

i. Kajiado Land Dispute Tribunal Case No. 375

of 1990 which was dismissed on 12th July 2007 and adopted by the Senior Resident Magistrates Court at Kajiado in Land Disputes Tribunal Case No. 33 of 2007 on 9th October 2007 and

ii. The Plaintiff having filed an appeal to the

Land Disputes Appeals Committee (sic) Rift Valley in case No. 17 of 2007 which was determined (dismissed) on the 28th October 2008.

Ought not to have the present suit as it contravenes the provision of section 8 (8) and (9) of the Land Disputes Tribunal Act 1990.

(b) No leave was sought to extend the period within which to file suit (assuming this suit was properly filed).

(c) The Appeals Committee decision being final on any issue

of fact no appeal shall be therefrom to any court.(sic)

(d) The Defendants having bought the suit properties in 1988

and 1991 respectively the current suit is time barred being filed 18 years after the alleged cause of action.

(e) The Plaintiffs suit should be dismissed with costs of the

Preliminary Objection and costs for the entire suit.”

2. I have read the submissions by advocates for the parties and I agree that following the decision in Mukisa Biscuits vs Westend Distribution Ltd [1969] E.A. 696, I can only uphold the Preliminary Objection if;
 - i. the facts in issue are undisputed and
 - ii. the pure point of law raised in the nature of a demurrer will bring to an end the entire dispute.
3. In the Plaint dated 18.3.2009, the Plaintiffs allege that the Defendant are “**beneficial owners**” of titles nos Ngong/Ngong/10377, 10376 and 10375 respectively. That the Defendants agreed to “**lend**” to the Plaintiffs their titles aforesaid at “**an agreed price**” of Kshs. 85,000/= each. That the Defendants “**being employees of a financial institution would secure a loan facility using the transferred title and subsequently recompense the Plaintiff as agreed.**”
4. That the Defendants breached the terms of that agreement and obtained the said titles fraudulent and secured them to obtain loans under false pretences. Certain orders are sought including an order that there be specific performance of the agreement and general damages for breach of contract.
5. The Statement of Defence dated 14.4.2009 denies the allegations in the Plaint and raises the same issues as are reproduced in the Notice of Preliminary Objection elsewhere above.
6. Can these issues be properly addressed by way of a Preliminary Objection.? I think not. Important as they all are, there is no evidence before me to point me to the decisions of the Kajiado Land Disputes Tribunal Case 375/1990 or Rift Valley Land Appeals Committee Case No. 17/2007. (sic). They may well exist and certain orders made but where are those orders? I cannot take the Defendant’s word on the subject. Grounds 1, 2, and 3 will therefore be overruled for that reason only.
7. Secondly, it is said that the said properties were bought in 1988 and 1991 respectively. Neither the Plaint nor the Statement of Defence indicate on what dates the agreements were executed. I do not have them on record. How can, I merely on the word of the Defendants, assume that they exist, and were executed on unclear dates in 1988 or 1991? Time is specific and no dates are indeed given anywhere in the pleadings or the Notice aforesaid.
8. In the end, like *Sir Newbold* in Mukisa (supra), I am inclined to think that this Objection “**unnecessarily**

increases costs” , “*Causes confusion of issues*” and I dare add is wholly incompetent.

9. I will overrule the objection with costs to the Plaintiff.

10. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **30th** day of **April 2010**.

H.P.G. WAWERU

JUDGE