



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 243 OF 2010

**VINCENT TUMBO SIRO.....PLAINTIFF/
APPLICANT**

VERSUS

**SOSPETER MOINDI MOKAYA.....1ST
DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL.....2ND
DEFENDANT/RESPONDENT**

RULING

The plaintiff's suit seeks certain orders against the 1st defendant and the Commissioner of Lands in respect of property known as **Kisii Town/Block II/66**. The Attorney General was sued on behalf of the Commissioner of Lands pursuant to the provisions of **the Government Proceedings Act, Cap 40 Laws of Kenya**. The suit was filed on 9th September 2010. Prior to commencement of the suit the plaintiff's advocate issued a notice to the Attorney General. The notice was dated 6th September 2010.

Together with the plaint, the plaintiff also filed an application seeking a temporary injunction to restrain the 1st defendant, his servants and/or agents from interfering with the tenants occupying one third of the suit property, which he said belonged to the estate of **Paul Mogaka Siro**. He alleged that the suit property was originally allotted as **L.R. No.1436/19/VII Kisii Township to Johnson Matundura Abuta and Sospeter Moindi**. On 16th August 1964 the original allottees wrote to the Commissioner of Lands requesting that **Siro Mogaka**, their trading partner, be registered as one of the owners of the said parcel of land. The Commissioner of Lands did as requested and on 8th August, 1972 the name of Siro Mogaka was entered in the lease certificate and the three partners were each accorded one third share of the suit property. The lease was for a period of 33 years from 1st January 1953.

The plaintiff further alleged that the 1st defendant in collusion with the Commissioner of Lands purported to renew the lease in respect of the suit property in the names of **Johnson Matundura**

Abuta and Sospeter Moindi to the exclusion of **Siro Mogaka**. Thereafter the 1st defendant started forcing Siro Mogaka's tenants occupying his one third share of the property to pay him rent with threats to evict them in default.

When the plaintiff's application came up for hearing, the 1st defendant raised a preliminary objection and stated that the suit was an abuse of the court process and that it was *sub judice* as there were other suits filed before the **Business Premises Rent Tribunal** being **No. 47 and 49 of 2010**. He further stated that the suit offends mandatory provisions of **section 3** of the **Public Authority Act** which relate to limitation period of filing suits founded on tort as against the Government. Such suits ought to be filed within 12 months from the date on which the cause of action accrued. The 1st defendant further argued that the plaintiff filed the suit before expiry of 30 days from the date of service of the notice to the Attorney General contrary to the provisions of **section 13 A** of the **Government Proceedings Act**. The section states as follows:

“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”

Section 2 of the said **Act** defines civil proceedings by or against the Government to include proceedings to which the Attorney General or any Government department or any officer of the Government is a party.

Although the last ground of the preliminary objection was not included in the notice that was served upon the plaintiff's advocate, Mr. Masese for the plaintiff chose to respond to all the objections as raised. He argued that although the law required a thirty days' notice to be given, where a property is in danger of alienation, orders can be sought to restrain such alienation or waste before expiry of the statutory period of time. He added that it was not for the 1st defendant to raise such an objection. It was only the 2nd defendant who could do so.

In respect of the other cases that are pending before the Business Premises Rent Tribunal, counsel submitted that the orders sought therein were different from the ones sought in this matter. The parties in those matters and in this one are also not entirely the same.

In **MUKISA BISCUITS MANUFACTURING CO. LTD. -VS- WEST END CO. LTD.** [1969] E.A. 696, it was stated that a preliminary objection consist 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. A preliminary point cannot be raised if any fact has to be ascertained. In that regard, the 1st defendant's argument that the plaintiff's suit is *sub judice* requires evidence to ascertain the exact nature of the suit and the prayers sought. The defendants have not yet filed a defence and raised that issue. A replying affidavit is not a pleading, it is evidence. The court cannot begin to analyze the contents of a replying affidavit for purposes of determining a preliminary objection. I therefore overrule the 1st preliminary objection as it does not qualify to be referred to as such in accordance with the holding in **MUKISA BISCUIT** case.

As regards the provisions of **section 3** of the **Public Authorities Limitation Act**, I do not think that the plaintiff's suit is time barred. In computing time the court has to take into consideration the date on which the lease was registered at the lands registry, Kisii, which was on 4th November 2009. I therefore agree with Mr. Masese that 12 months have not yet elapsed since then.

With regard to the provisions of **section 13 A** of the **Government Proceedings Act**, Mr. Masese's submissions are not correct in law. The aforesaid section is categorical that no proceedings against the Government shall be instituted until after the expiry of a period of thirty days after service of a notice to the Attorney General. The suit was filed three days after service of the said notice. The suit offends the aforesaid mandatory provisions. It is bad in law and unsustainable. There was nothing wrong with the 1st defendant drawing the court's attention to the said illegality. The court on its own motion can strike out a suit which is filed in contravention of the law. Consequently, the plaintiff's suit, having been commenced contrary to the mandatory provisions of **section 13 A** of the **Government Proceedings Act** is hereby struck out with costs to the 1st defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF SEPTEMBER, 2010.

D. MUSINGA

JUDGE.

27/9/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Otieno for Mr. Nyambati for the Applicant

Mr. Moracha for Mr. Masese for the Respondent

Court: Ruling delivered in open court on 27th September 2010.

D. MUSINGA

JUDGE.