



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(NAIROBI LAW COURTS)

Civil Suit 446 of 2000

JOHANNA MBOGO1ST PLAINTIFF
MTUMISHI CHURCH OF GOD.....2ND PLAINTIFF

VERSUS

JOSEPH KIMARI.....1ST DEFENDANT
REUBEN GICHUNGU.....2ND DEFENDANT
TERESA NYAMBURA.....3RD DEFENDANT

R U L I N G

1. A preliminary objection has been raised to a notice to show cause, issued against the defendants/judgment debtors under Order XXI Rule 18 of the Civil Procedure Rules, requiring them to show cause as to why they should not be evicted from Land Parcel No.33716 Dandora Area Phase III. The preliminary objection which is brought under Rule 23 of the Constitution of Kenya Supervisory Jurisdiction and Protection of Fundamental Rights, raises the following grounds:

(i) The enforcement of the decree dated 13th March, 2002 against Pitch Plots No.A185, A186 and A187 that were never the subject matter of this suit will violate, whittle-down or otherwise compromise the defendants' rights to protection of law under Section 70 and 77 of the Constitution.

(ii) The enforcement of the decree dated 13th March, 2002 against Pitch Plots No.A185, A186 and A187 that were never the subject matter of this suit will violate the defendants' rights to protection from derogation of property under Section 75 of the Constitution.

(iii) The execution of the decree dated 13th March, 2002 will violate the defendants' right to protection against arbitrary search or entry under Section 76 of the Constitution.

2. Mr. Kibe Mungai who raised the objection submitted that although the decree sought to be executed was in respect to Plot No.33716, execution is being sought against different plots which are Pitch Plots No.A185, A186 and A187 in respect of which the defendants own letters of allocation from the City Council. Mr. Kibe argued that execution could only proceed against those plots if the decree was amended to show that plot No.33716 is the same as A185, A186, and A187 or if it is demonstrated to the court that the physical location of the plot is the same.

3. Referring to the former Constitution of Kenya, (which was then in force), Mr. Kibe further submitted that under Section 70 and 77 of that Constitution, the defendants have a right to protection of the law in regard to their properties which are not subject of the decree. Mr. Kibe pointed out that under Section 75 of the Constitution the defendants have a right to their property, while under Section 76 the defendants have a right against arbitrary entry into their property which can only be defeated by a decree or order of the court authorizing such entry. Mr. Kibe argued that the court has a duty to ascertain that the enforcement of the decree was not being done on a wrong property.

4. Mr. Matwere who appeared for the plaintiffs/decreed holders, submitted that the objection raised did not fall within the threshold of a preliminary objection as stated in the case of *Mukhisa Biscuit*. Mr. Matwere pointed out that a judgment of a competent court cannot be challenged in Constitutional Court, except where there is lack of due process or unconstitutionality. Mr. Matwere submitted that where there was fear rights likely to be violated or alleged violation, the court could not enforce the protection of fundamental rights without regard to the rights of others. He maintained that the plaintiff/decreed holder, has a decree issued by a competent court and enforcement of the decree cannot be violation of Constitutional Rights.

5. Mr. Matwere argued that Section 77A of the Constitution recognizes decisions and decrees of the court. And therefore, failure by the court to recognize the decree would be unconstitutional. Mr. Matwere contended that the issues which were being raised now were *res judicata*, as the issue of the subject suit was already dealt with in previous rulings of the court. The court was therefore urged to dismiss the preliminary objection.

6. Rule 23 of the Constitution of Kenya Supervisory Jurisdiction and Protection of Fundamental Rights states as follows:

“Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.”

7. The question therefore is whether the issues being raised by the defendants/judgment debtors are constitutional issues.

8. I have carefully perused the court record. I have also considered the objection and the submissions made before me by both counsel. It is evident that the decree which is sought to be executed seeks eviction of the defendants/judgment debtors from Land Parcel No.33716 Dandora Phase III. Obviously, enforcement of the decree against Pitch Plots No.A185, A186 and A187 would be contrary to the decree, unless the Pitch Plots are the same as Land parcel No.33716. The defendant/judgment debtors are contending that the enforcement of the decree against the Pitch Plots would be a violation of their constitutional rights, as the Pitch Plots belong to them. Indeed, it has been submitted that they own letters of allocation in respect to the Pitch Plots.

9. In my view, the objection raised, raises the issue as to whether Land Parcel No.33716 claimed by the plaintiffs/decreed holders is the same as Pitch Plots No.A185, A186 and A187 claimed by the defendants. This issue is not a new issue as it formed the subject of prayer No.2 of an application dated 24th September, 2003, in this matter. The prayer as reproduced in the ruling of Lenaola J dated 16th December, 2003 was as follows:

“That there be an order restraining the respondents from trespassing, constructing in or any other manner interfering with the suit premises being plot No.33716 Dandora and/or the purported pitch plot Nos.A1846, A186 and A187 pending the hearing and determination of this application.”

10. In that application, Lenaola J. dismissing the application observed that the purported pitch plot were not the subject of the suit. In another application dated 9th July, 2008, the defendant/respondents sought inter alia, an order that a declaration be and is hereby issued declaring that the decree dated 13th March, 2002, does not apply to the applicants pitch plots No.A185, A186 and A187. And that a declaration be issued declaring that the suit property herein known as plot No.33716 Dandora Area III does not exist. That application was heard by Sitati J. who noted that the trial court had dealt with the issue of the suit plot and exercised its judicial mind on the matter. Sitati J. rejected the application contending that to allow it would be to unnecessarily open a can of worms.

11. Thus, the issues now being raised by the defendants/judgment debtors, has already been dealt with. If the defendants/judgment debtors were dissatisfied the right place to raise the issue would have been the Court of Appeal. Moreover, for the court to deal with the issue raised by the defendants/judgments debtor as a constitutional issue, the defendants/judgments debtor have to establish not only that the pitch plots are the same as Land Parcel No.33716 Dandora Area Phase III, but also that the defendants have proprietary rights over the pitch plots. For it is only when the property rights are established, that the protection of the individuals constitutional rights over property can come into play. However, the court cannot at this stage go into the issue of determination of such proprietary rights as those were substantive issues to be determined in the main suit.

12. For the above reasons, I overrule the preliminary objection. Those shall be the orders of this court.

Dated and delivered this 8th day of October, 2010

H. M. OKWENGU
JUDGE

In the presence of: -

Matwere for the plaintiffs/decreed holders

MS Chelangat H/B for Kibe for the defendants/judgment debtors

Kosgei - Court clerk