



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. CIVIL APPLICATION NO. 54 of 2008 (JR)

TITUS MWINZI & 6 OTHERS.....PLAINTIFFS

VERSUS

THE DISTRICT COMMISSIONER MBEERE & 3 OTHERS.....DEFENDANTS

R U L I N G

The Ruling is in respect of the preliminary objection by the 2nd Respondent – namely the County Council of Mbeere dated 3/11/09.

The notice of preliminary objection dated 3/11/09 raises only one point of law – that a similar Application as the one in court was heard and dismissed by the honourable court. Counsel for the 2nd Respondent submitted that the Applicant filed the same application against the same parties and that such a recourse was not open to them. He submitted that the only recourse open to the Applicant was by way of Appeal.

Unfortunately the order dismissing the said motion was not annexed to the preliminary objection and I have not been able to specifically make reference to the same. The court directed that the parties file written submissions in respect of the Preliminary objection which the counsel for the 2nd Respondent thereafter filed supplementary submissions dated 10.5.2010 in which he raised a new point of law. This being purely a point of law, the law allows him to raise it at any stage. The point raised in the latter submissions was that the land under dispute is situated in an adjudication area and as per **Section 30 of the Land Adjudication Act Cap 284 of the Laws of Kenya**, no person should commence any suit without the express authority of the adjudication officer.

There was no such authority from the adjudication officer and he therefore submitted that the suit is defective and the same should be dismissed. He has annexed to those submissions the **Gazette Notice – L.N. No. 169 of 1970** which states that part of Trust land situated within Mbeere Division of the Embu Administrative District was covered under Section 30 as an Adjudication area.

On those 2 points, he urged the court to dismiss this suit.

The Applicant in response thereto submitted that the Application was filed afresh after Justice Visram allowed the filing afresh of the same. He submitted that a similar objection was raised before Justice Ransley who overruled the same vide his Ruling dated 29.1.02.

On the second point he submitted that the land has not been declared a land Adjudication Area. In his submissions however, he admits that;

“We need a letter from the Land Adjudication Department from the Area in question to show that the Area was adjudicated upon or it is a Land adjudication Area currently so that it could have the suit withdrawn from court to be heard by the Land Adjudication officers.”

My question however is – who is supposed to procure the said letter? The Applicant is the one asserting that the area is not an adjudication area. It therefore behoves him to avail the said letter.

Counsel for the interested parties largely adopted and reiterated the submissions by counsel for the 2nd Respondent.

I have considered the able submissions of all counsel herein. On the issue of the Application having been filed without the leave of the court, the law is clear, Applications for prerogative orders cannot be filed without the requisite leave of the court.

I have nonetheless seen a copy of the handwritten order of Judge Visram dated 6.11.01 where he granted leave to the Applicants to file the Application.

I have also seen the annexed proceedings before Ransley C.A. (as he then was) dated 29.1.02. He directed that a fresh suit be instituted. In my view, there was lawful and valid leave to institute this application and I cannot therefore strike out or dismiss these proceedings for lack of leave.

I also find that the Application was not *Res Judicata* as the same has never been determined on merit.

The first prong of the preliminary objection must therefore fail.

On the second issue of compliance with Section 30 of Cap 284, I have seen the legal notice declaring Mbeere Division presently Mbeere district as an adjudication area. Some if not all the areas mentioned herein fell within the said Mbeere District in which case they would call for compliance of Section 30 of Cap 284. As stated earlier, it is up to the Applicant to avail such a letter from the adjudication officer to confirm if the land in question falls within an adjudication area.

The reason for this is that the determination or rights over land in an adjudication area is subject to a different process which is clearly defined under Cap 284.

The same cannot be subjected to the court's jurisdiction.

This point of law therefore does have merit. Rather than dismiss the entire motion at this stage however, I will stay all proceedings herein and give the Applicant 60 days to avail the said letter for the Adjudication officer failing which the notice of motion dated 7.2.02 will stand dismissed.

W. KARANJA

JUDGE

Order

Costs of the preliminary objection to be in the cause.

W. KARANJA

JUDGE

Delivered, Dated & signed at Embu this 23rd day of November 2010

In the presence of:- Mr. Okello, Mr. Kamunde & Mr. Ithiga for Masika for the parties.