

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 238 of 1992

ELIUD BUKU THUKU..... PLAINTIFF

VERSUS

PAUL KARIUKI MWANGI.....1ST DEFENDANT

LAND REGISTRAR MURANG'A.....2ND DEFENDANT

EUNICE NYAMBURA.....3RD DEFENDANT

RULING

On 6th October, 1998, the 1st defendant through **Messrs S.K. Njuguna advocates** filed a Notice of Preliminary Objection to the suit by the plaintiff. The Notice was couched in these terms:-

“1. THAT this suit which names the Land Registrar, Murang’a as the 2nd defendant without joining the Attorney General as party is bad in law and militate against among others, the provision of sections 12 and 13 of the Government Proceedings Act, Chapter 40 Laws of Kenya.

2. THAT without prejudice to 1 above the suit against the 1st defendant is not maintainable in law because the Honourable the Attorney General has not been made a party to suit.”

In support of the Preliminary Objection, **Mr. Njuguna**, learned advocate for the 1st defendant submitted that without joining the Attorney General in the proceedings, the entire suit was bad in law. It also militated against the provisions of *section 12 and 13* of the Government Proceedings Act. The plaintiff had joined the Land Registrar as the 2nd defendant and made allegations of fraud against him and the 1st defendant. That they had unlawfully removed a caution and thereafter effected a transfer of part of the original suit premises to the 1st defendant. No stamp duty had been paid on the transaction. Under section 12 of the Government Proceedings Act, a suit against Government should only be instituted in the name of the Attorney General. For this submission, the learned advocate relied on the case of **Mugaki & Another Vs Minister for Local Authorities (2000) KLR 24**. The case against the Land Registrar cannot therefore stand. By the same token the case against the 1st defendant cannot also hold since the particulars of fraud alleged touched on the Land Registrar.

Ms Munyi, learned principal litigation counsel on behalf of the 2nd defendant, supported the submissions by **Mr. Njuguna** and urged me to uphold the preliminary objection and dismiss the suit.

Mr. Kiminda, learned advocate for the plaintiff opposed the preliminary objection. He submitted that he had no problem with the Attorney General falling out of the proceedings. This was a case of misjoinder which is not fatal to the suit. Non-payment of stamp duty and removal of the caution were matters of evidence.

I have carefully considered the preliminary objection raised, the rival submissions and the law. I am satisfied that the preliminary objection is misconceived. The 1st defendant is not complaining that he was not properly sued. He was. However, he is seeking to take aride on the 2nd defendants defence to

advance his own defence. As properly pointed out by **Mr. Kiminda**, this is a case of misjoinder. Misjoinder or non-joinder of a party to a suit perse does not in itself render such suit fatally defective. Indeed order 1 rules 9 and 10 of the Civil Procedure rules provide answers to the 1st defendant's concerns. First it is provided therein that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. Secondly, the court has jurisdiction to substitute a party wrongly sued and to bring on board a party who ought to have been sued. If the 2nd defendant is minded to be removed from the proceedings he will move the court as appropriate for such an order. Further I do believe that failure by the plaintiff to comply with the provisions of *section 13A* of the Government Proceedings Act does not affect his rights as against the 1st defendant.

With regard to non-payment of stamp duty and removal of the caution, I am unable to discern the relevance of those issues to the preliminary objection. How does the none-payment of stamp duty on the transfer and the removal of the caution registered by the plaintiff advance the 1st defendants case? I cannot see any. In any event those are matters of evidence.

For all the foregoing reasons, I would dismiss the preliminary objection with costs to the respondents.

Dated and delivered at Nyeri this 21st day of May, 2009

M.S.A. MAKHANDIA

JUDGE