



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI Civil Suit 102 of 2008

MARIAM MUENI MUSEMBI & ANOTHER.....PLAINTIFFS

VERSUS

COMMISSIONER OF LANDS AND 5 OTHERS.....DEFENDANTS

R U L I N G

Mr. Ritho (counsel for plaintiff) filed a Notice of Preliminary Objection which he sought to be heard first saying it will determine issues in the Notice of Motion (if upheld) and applicant would be easily declared as having no locus standi. He pointed out that issues in the Preliminary Objection include matters under section 7, 8, 68 of the Civil Procedure Act, Order XXI Rule 89 Civil Procedure Rules and the doctrine of Estoppel by judgment interpartes. However the move is opposed on grounds that what is purported to be a Preliminary Objection dated 19-12-08 is really dealing with issues of facts and not points of law and the court will have to address both issues of fact and law. I have read the notice of Preliminary Objection which states that it is on points of law to the effect that:

- 1) Under the Civil Procedure Act Section 7 and 8 and also Order XXI Rule 88 and 89 of the Civil Procedure Rules, the applicant M/s Holborn Properties Ltd who was registered proprietor of LR Chembe/Kibambamshe/428 on 31st January 2008 long after 1997 when this suit was filed, is not entitled to be heard in this suit.
- 2) M/s Holborn Properties Title Deed issued on 31st January 2008 based on unconstitutional illegal and null and void, Edition II Land Register of L. R. Chembe/Kibambamshe/428 opened on 22nd December 1986 when Edition Land Register of LR Chembe/Kibambamshe/428 opened on 30th May 1978 and the first registration and registered Land Act Cap 300 was and is still constitutionally and legally in force and valid. The title deed is unconstitutional, illegal and null and void ab initio.
- 3) The applicant M/s Holborn Properties Ltd Title Deed issued on 31st January 2008, is among the registration of transactions declared among the registration of transactions declared in the Preliminary Decree given on 10th November unconstitutional, illegal and null and void ab initio, revoked and cancelled and the said Preliminary decree has not been appealed against in accordance with the Civil Procedure Act section 68 by the parties in the suit who the interested party is their privies, which moves the applicant to be bound by the orders against the defendants in the said Preliminary Decree given on 10th November 1999 and issue on 10th July 2003.

- 4) The interlocutory judgment applied for on 15th December 1999 and duly entered on 25th February 1999 and 10th November 1999 and issued on 10th July 2003 and also the consent entered between the plaintiff's advocates M/s S. K. Ritho and Co. Advocates for and on behalf of all the defendants who include the Honourable Attorney General, dated 3rd December 2004 and 18th February 2005, the applicant who was only illegally and unconstitutionally registered on 22nd December 1986 and which is not open to public unless with specific written permission of chief Land Registrar is granted leave, have no right or jurisdiction under Order XXI Rule 88 and 89 and section 7 and 8 of the Civil Procedure Act and also under the Doctrine of Estoppel by Judgment interpartes as expressed in Halsbury's Laws of England, 3rd Edition, Vol. 15 page 196-19 to apply to set aside or be vacated by the same court.
- 5) That the applicant got itself registered in an unconstitutional, illegal and null edition of the Land Registrar while being aware of Caveat Emptors published on 28th May 2003 14th April 2005 and 25th February 2008 by M/s S. K. Ritho and Co. Advocates in which LR Chembe/Kibambamshe/428 has been clearly stated to be subject to High Court cases one of which is HCCC No. 3107 of 1997 Nairobi specifically stated that the Land Registrar Kilifi, the Chief Land Registrar and the Commissioner of Lands, have been doing illegal dealings with the suit lands, which include LR Chembe/Kibambamshe/428.
- 6) The 1st Plaintiff M/s Mariam Mueni Musembi's Registrar in the 1st Edition of Land Register, opened on 30th May 1978 under which Land Certificate dated 15th June 1978 was issued, is protected by Constitution of Kenya section 116(1) and 75 of the Registered Land Act (Cap 300) Section 143 (1), section 159 and section 163, and Commissioner of Lands Circular letter No. 113936/55 of 28th May 1986 and Gazette Notice No. 2505 of 30th May 1986 in that the Commissioner of Lands stated and informed that 1st plaintiff that the Commissioner of Lands would instruct the Attorney General to file a suit in court and have the court cancel the plaintiff's Land Title which never happened.
- 7) In the absence of court orders between 28-5-86 and 22-12-86 applied for by the Attorney General under section 143 and 159 of the Registration Land Act Cap 300, the plaintiffs are not aware of any purported transactions by the Commissioner of Lands, Chief Land Registrar, Permanent Secretary, Ministry of Lands and Settlement and Officer Advisor Settlement Fund trustees are unconstitutional, illegal, null and void ab initio and the Constitutional Court in **HCCC Originating Motion Misc. Appl. No. 730 of 198** Judgment dated 14th March 2002 is very clear that 1st registration on the 1st Edition is constitutionally deemed to be the valid registration in spite of the cancellation hence the 1st plaintiff is constitutionally and legally the registered absolute proprietor of LR Chembe/Kibambamshe 428 in spite of the alleged cancellation and registration of the Government of Kenya on 22-12-86, if it happened as indicated and the said registration conferred on the Government of Kenya, including Holborn Properties (Applicant) no constitutional known land rights – the 1st registered proprietor is still by law the registered proprietor and not the applicant.
- 8) The constitutional and legal interest of the applicant which is purported to have been registered on 31st January 2008 depends on constitutional, legal land rights, which the Government of Kenya, through the Commissioner of Lands had on 22-12-86, when the 2nd Edition Land Registrar (which had already been declared illegal in the Preliminary Decree).
- 9) The area where LR 428 is situated, was adjudicated between 1976 and 30th May 1978, and the first registration took place on 30-5-78 in which the 1st plaintiff was the first registered proprietor and in 1997, because of purchaser's interest, the 2nd plaintiff was ordered up by the plaintiff as claimant in HCC No. 3107 of 1997 (now HCCC 102 of 2008 Malindi) and that means this court has no jurisdiction to interfere with the said first registration which has been confirmed by the Preliminary Decree.
- 10) The applicant lacks locus standi because of the doctrine of Res Judicata, Estoppels by judgment interpartes, Registered Land act section 143(1) 159, 163 and the Constitution of Kenya section 75 and 116(1).

11) In the absence of court orders canceling first registration which no court can grant because of section 116(1) and 75 of the Constitution and section 143(1) of Cap 300, the application is only a trespasser in LR Cehbme/Kibambamshe/428 and has no land rights recognizable by the Constitution of Kenya because of its Title Deed issued to court on 31st January 2008, many years after HCCC 3107 of 1997 and which makes the applicant to be subject to section 7 and 8 of the Civil Procedure Act and Order XXI Rule 88 and 89.

This is what Mr. Maosa, counsel for the applicants, objects to on grounds that the same revolve on pleadings and material facts, and have improperly assumed that all the pleadings by the plaintiffs are correct and undisputed yet they revolve around material facts which are seriously disputed by the applicant in the affidavit of Fernando Vischi sworn on 17-11-08 and these are issues which should be addressed at the hearing of the application, on merit.

In arguing his objection, Mr. Maosa submitted that contents of paragraph 4 and 9 of paragraph 8 are on matters which are burning. He cited the case of **Mukisa Biscuits Manufacturing Ltd V. Wested Distributors Ltd [1969] EA 696 pg 8** to support his argument that the Preliminary Objection here contains points of law and fact that it should not be entertained.

Mr. Maosa's contention is that the facts in the matter are not clear and that and so confused as it is not even ascertained whether registration was in the first edition.

Even on the issue of Res Judicata, Mr. Maosa submits that if one were to look at the proceedings being relied on, those constitute facts and not issues of law.

He also asked the court to consider the decision in **Ali Swaleh Lali V Stephen Mathenge and 11 others HCC 3374 of 1994**. Mr Ritho's response is that there are many points of law raised in the Preliminary Objection and that there are not many issues of fact except for facts to support what he has stated.

In considering the Preliminary Objection, and the objection to it even being argued, the court is guided by the principles laid down in the celebrated case of **Mukisa Biscuits (infra) at page 700 Law JA** stated:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection, may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

This was further expounded by Sir Charles Newbold at page 701.

“.....it raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

I will say this, the grounds of Preliminary Objection listed by Mr Ritho address many issues, certainly there are points of law specifically raised such as the question of locus standi, estoppel by interpartes judgement, Res Judicata and provisions under Order XXI Rule 88 and 89. The problem is there are also issues of fact raised in the same preliminary objection which would best be dealt with at an interpartes hearing where evidence would be adduced to support those facts – for example paragraph 2 with regard to when the 2nd Register Edition was still in use – that is an issue of fact that requires evidence to support it, it is not a point of law – although it's result is that it has certain legal implications. Paragraph 6 is also a mixture of issues of fact and points of law as it refers to the self same 1st Edition Land Register and the effect of a letter written by the Commissioner of Lands – it would serve the Respondent well to sieve out points of law. Certainly once the preliminary objection is presented in its present content, the court would have to consider both the issue of fact and law, and in so doing, will have failed the **Mukisa Biscuits** test.

There is also a lot of repetition, almost resembling a religious chant about everything being

unconstitutional, illegal, null and void ab initio – some of which with all due respect, to counsel do not add much value to the Preliminary Objection's content.

Infact a lot of paper and time could have been saved by just raising Preliminary objection based on the contents of paragraph 10 (Locus standi, Estoppel, RLA, the constitution and reference to section 7 & 8 CPA and Order XXI Rule 88 and 89. The entire Preliminary Objection is a mouthful – but unfortunately containing a lot of repetitions – in its present state of content, it cannot proceed to be heard as the Court should not be the one sifting wheat from the chaff. The objection raised by Mr. Maosa has merit and I make a finding that the Preliminary Objection dated 19th December 2008 is improperly presented to this Court and shall therefore not be argued before hearing of the Notice of motion which had been scheduled.

The Respondent/Plaintiff bears costs thereto.

Delivered and dated this 15th day of June 2009 at Malindi

H A OMONDI

JUDGE

Mr Maosa for Applicant

No appearance for Defendants

No appearance for Plaintiff