



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 76 of 2006

**KENYA RAILWAYS CORPORATION1ST PLAINTIFF
JOHN BOSCO MUSYIMI USWII T/A
MUSKAT COMMERCIAL AGENCIES 2ND PLAINTIFF
BENJAMIN K. TIREITO T/A OETGEI ENTERPRISES...3RD PLAINTIFF
VERSUS
MAMUSU ENTERPRISES LIMITED 1ST DEFENDANT
ELDORET HOTEL LIMITED2ND DEFENDANT
THE COMMISSIONER FOR LANDS 3RD DEFENDANT
THE ATTORNEY GENERAL 4TH DEFENDANT**

RULING

The Plaintiffs, the Kenya Railways Corporation, John Bosco Musyimi Uswii and Benjamin K. Tireito filed this suit against four Defendants namely, Mamusu Enterprises Limited, Eldoret Hotel Limited, Commissioner of Lands and Attorney General.

The Plaintiffs seek the following remedies against the Defendants:-

(a) A declaration that the allocation/registration of a lease in favour of the 1st Defendant and other and subsequent transfer and registration of a lease in favour of the 2nd Defendant is illegal, null and void.

(b) A declaration that the Plaintiffs are the rightful owners of the suit land and subsequently an order for cancellation of certificate of lease in respect of ELDORET MUNICIPALITY BLOCK 3/58.

(c) An order directing the 3rd Defendant to rectify in accordance with prayer (b) above.

(d) A permanent injunction to restrain the Defendants, their servants, and/or agents from interfering with the Plaintiffs' use and occupation, transferring, selling encumbering and/or otherwise dealing with land parcels NO. ELDORET MUNICIPALITY BLOCK 3/58.

(e) Costs of the suit plus any relief the Court
Simultaneous with the Plaint dated 4th July, 2008, the Plaintiffs also filed an application under the provisions of Order 39 of the Civil Procedure Rules in which they sought interim injunctive orders pending the hearing of the suit.

At the hearing inter partes of the said application the 1st and 2nd Defendants raised the following preliminary points of law:-

1. Application is based on a suit without foundation.
2. The suit and the application violates the Law of Contract, Act Cap 23 Laws of Kenya

The suit and the application is instituted by volunteers without locus standi.

4. The suit and the application are fatally defective.

The Court directed that points 1 and 4 were too general and vague as to constitute preliminary points of law. The Counsel for the said Defendants agreed to present and argue points 2 and 3 only.

On their part, the 3rd and 4th Defendants also raised preliminary points of law on the following grounds:-

1. That the Plaintiffs' suit does not lie as against the 3rd and 4th Defendants for failure to comply with the provisions of Section 13A of the Government Proceedings Act, Cap 40, Laws of Kenya.

2. That the Plaintiff's suit as against the 3rd and 4th Defendants is fatally defective for failure to comply with the provisions of Section 136 (1) of the Government Lands Act, Cap. 280 Laws of Kenya.

3. That the Plaintiffs' suit is untenable and time barred by virtue of the provisions of Section 3 of the Public Authorities Act, Cap 39 Laws of Kenya.

4. That the Plaintiffs' suit is incompetent and bad in law for failing to comply with the provisions of Section 136 (2) of the Government Lands Act, Cap. 280 Laws of Kenya. It was agreed that both the preliminary objections raised by the 1st and 2nd Defendants and those by the 3rd and 4th Defendants be heard together and a single/composite ruling be made on all the aspects of the points of law raised.

I have carefully considered the preliminary points of law raised by the 1st and 2nd Defendants. It is my view that the said grounds or purported points raised matters of fact that would require an inquiry, ascertainment and/or even the exercise of judicial discretion. As was held in the case of **MUKISA BISCUIT MANUFACTURING LIMITED –V- WEST END DISTRIBUTION LIMITED (1969) EA 697:-**

“... A preliminary objection is in the nature of what used to be a demurrer. 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”

When considering the points raised by the 1st and 2nd Defendants, I was compelled to study the pleadings, affidavits and even the exhibits. For the court to make a decision it has to make findings or determine issues of fact.

I therefore hold that the purported grounds set out in the 1st and 2nd Defendants' Notice of Preliminary Objection do not constitute pure points of law. They are disallowed with costs to the Plaintiffs.

With regard to the preliminary points of law raised by the 3rd and 4th Defendants, Mr. Tororei for the Plaintiffs was asked by the Court whether he could show or prove that they had served any Notices under the provisions of Section 13A of the Government Proceedings Act and Section 136 (1) of the Government Lands Act.

Despite an adjournment in the course of the day of hearing of the application, Mr. Tororei was unable to obtain any copy or evidence of service of the Notices. He confirmed to the Court that he could not show that the Notices were served.

As a result, the arguments proceeded on the basis that in fact there had been no service of any of the said notices.

In paragraph 4 of the Plaint it is averred that:-

“The 3rd Defendant is an officer of the Government of Kenya, whose duties includes the registration of transactions involving land, while the 4th Defendant is sued alongside the 3rd Defendant in his capacity as the Principal Legal Officer of the Government of Kenya.”

Section 13A(1) of the Government Proceedings Act, Cap 40 Laws of Kenya provides, inter alia, that:-

“No proceedings against the Government shall lie and be instituted until after the expiry of a period of thirty days after Notice in writing in the prescribed form shall have been served on the government in relation to those proceedings.”

However, there is a proviso in respect of proceedings which seek declaratory orders. The proviso reads:-

“

(3) The provisions of this Section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the Court may by virtue of proviso (1) of Section 16 (1) of this Act make an order declaratory of the rights of parties in lieu of an injunction.”

On its part Section 16 (1) provides:-

“16 (1) In any civil proceedings by or against the government the Court, subject to the provisions of this Act, have power to make all such orders as it has power to make this proceedings between subjects and otherwise to give such appropriate relief as the case may require:-

Provided that –

(i) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the right of the parties, and

(ii) in any proceedings against the Government for the recovery of land or other property the Court shall not make an order for the recovery of the land or the delivery of the property but may in lieu thereof make an order declaring that the Plaintiff is entitled as against the Government to the land or property or to the possession thereof.”

In this suit, prayers (a) and (b) seek declarations of rights between subjects while prayer (c) seeks an order for recovery of land by way of rectification of the register in the Certificate of Lease in respect of the suit property.

In the case of **GRACE NDEGWA & OTHERS –V- HON. ATTORNEY GENERAL C.A. NO. 228 OF 2002** the Court of Appeal held:-

“Further, we also note that one of the reliefs sought was declaration that the retrenchment programmed is discriminatory, defamatory, illegal, null and void. That declaratory relief was sought by all the claimants in the original Plaint, and in the Amended Plaint. Section 13 A of the Government Proceedings Act does not cover such a relief which means that the Appellants needed not issue notice of intention to sue in respect of declaratory relief as by dint of Section 13 A (3) relief such as those seeking declaration are not covered by provisions of Section 13 A (1). That being the case, the

Court could not strike out parts of the reliefs sought and leave other parts”

In the light of the foregoing, I do hold that the proviso in Section 13 A (3) is applicable in this case and the Plaintiffs were not obliged to give notice to the 3rd and 4th Defendants under the aforesaid provisions.

With regard to issues of Limitation of Actions raised by the 3rd and 4th Defendants, Section 136 (1) of the Government Lands Act provides that:-

“136 (1) All actions unless brought on behalf of the government for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards.”

In this case, it is alleged that the Commissioner of Lands allocated the suit property to the 1st Defendant without consent from the 1st Plaintiff and the same was fraudulent.

It is stated in the Complaint that a search conducted at the Eldoret Lands Registry indicated that after a purported allocation by the 3rd Defendant to the 1st Defendant of the suit land a lease was issued on 27/1/1997 to the 1st Defendant in common with others. It is this action by the 3rd Defendant which is challenged. There is no dispute and is confirmed in paragraph 4 of the Complaint that the 3rd Defendant is sued for acts and/or omissions carried out in the course of his statutory duties as set out in the Government Lands Act. Section 5 of the Act is the one that establishes the office of the Commissioner of Lands.

This suit was filed on 5th July, 2006. The alleged allocation, transfer and registrations took place in 1997. The cause of action arose in 1997 and no suit could be instituted after one year of the date the cause of action arose.

The suit herein as against the 3rd and 4th Defendants is time-barred under this provision. The 3rd and 4th Defendants also have relied upon and invoked the provisions of Section 3 (1) of the Public Authorities Limitation Act Cap. 39 which provides that:-

“3 (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued”

The question to ask is whether the cause of action against the 3rd and 4th Defendants is one founded on tort or contract.

I have studied the Complaint and it is clear that the claim or cause of action is founded on fraud which is neither tort nor contract. As a result, I hold that Section 3 of the said Act does not apply in this case.

The 3rd and 4th Defendants also have invoked the provision of Section 136(2) of the Government Lands Act Cap. 280 which reads:-

“2. Notice of writing of the action and the cause thereof, shall be given to the Defendant one month at least before the commencement of the action.”

The Plaintiff could not refer to or produce any notice served under or in compliance with this Section. This provision is mandatory. It does not have any proviso or qualification. Any benefit given to the Plaintiff under the proviso in Section 13 (A) of the Government Proceedings Act, is taken away by Section S. 132 (2) of this Act.

The Plaintiffs failed to comply with the notice requirement before filing the suit as provided for by Section 136 (2) of the Government Lands Act Cap 280. On these grounds, I do hold that this suit as against the 3rd and 4th Defendants is incompetent. It is a nullity on the basis of being filed out of time and lack of service of notice under Section 136 of the Act.

As a result of the foregoing, I do hereby dismiss the Plaintiffs' suit as against the 3rd and 4th Defendants with costs.

The three substantive reliefs in prayers (a), (b) and (c) are, inter alia, directed against the 3rd and 4th Defendants. The suit against them has been dismissed. The said reliefs, remedies or orders cannot be granted without the 3rd and 4th Defendants being parties. For the Court to grant the reliefs it must make findings against the 3rd Defendant in respect of how it allocated the land, transferred it and registered it. One cannot de-link the 3rd and 4th Defendants from the Plaintiffs' cause of action.

After the dismissal of the suit against the 3rd and 4th Defendants, the substratum of the cause has disappeared leaving only one relief, that of permanent injunction. This relief hangs in the air and has no cause of action to be grounded on. It must therefore collapse.

In exercise of this Court inherent jurisdiction and discretion, I find that there is no useful purpose which will be served to allow the suit as against the 1st and 2nd Defendants to remain. It has no chance of survival ultimately.

While amendments can sustain the suit, it is my view that any intended amendment herein will certainly change the character and cause of action of the suit probably giving rise to a new cause of action.

I therefore do hereby also dismiss the suit against the 1st and 2nd Defendants with costs. The sum effect is that the entire suit is dismissed with costs.

The Interim Orders of injunction are hereby discharged.

DATED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF MAY, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Ngigi for the 1st and 2nd Defendants

No appearance for the Plaintiffs

No appearance for the 3rd and 4th Defendants