REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

Civil Case 196 of 2006

JEREMIAH OMUYOYI ESIPIRA………….................………PLAINTIFF.

VERSUS

PHILEMON LUMBASI WAMBIA………................……..DEFENDANT.

R U L I N G.

This suit was instituted by way of a plaint which was filed in court on 28th November, 2006.

In the plaint, the party bringing the suit expressly stated that he had been duly authorized, by the registered proprietor of the suit property, to cultivate the land, and also to enter into contractual dealings in respect to the said land, which is **TRANS NZOIA/MARIDADI/395.**

In that capacity, the plaintiff brought action, with a view to having the defendant evicted from the property, because the defendant is said to have entered onto the land and to have planted a crop thereon. The said actions of the defendant were said to have been without the knowledge of the plaintiff.

The defendant did file a defence to the action, on 14th December, 2006. In the said defence, it was asserted, that the property that is the subject matter of the suit belongs to the defendant. Indeed, the defendant's contention was that he had not only been the owner of the land all along, but that he had been in occupation for over 22 years, as at 14th December, 2006.

Furthermore, the defendant pointed out that the person who had allegedly given authority to the plaintiff herein, was a defendant in a suit which the defendant herein had instituted before the High Court, at Kitale. That suit is said to be Kitale, High Court Miscellaneous Application No. 70/2006, which was still pending before the court.

Finally, the defendant asserted that the suit herein was fatally defective, and ought therefore to be dismissed with costs.

The plaintiff responded to the defence by filing a reply thereto. By the said Reply to defence, the plaintiff contended that he had a legal interest in the suit property, by virtue of the power of attorney which had been donated to him by the person who was the registered owner of the suit property.

As far as the plaintiff was concerned, it was the defendant who was misconceived by believing himself to be the owner of the land.

Shortly after the defendant was served with the Reply to Defence, he filed a notice through which he was telling the plaintiff that the plaint was fatally defective. The defendant therefore wanted the plaint struck out, with costs.

There is an affidavit of service in the court records, which indicates that the defendant's notice of Preliminary Objection to the suit was served upon the advocates for the plaintiff on 17th January, 2007.

Notwithstanding the said service, the plaintiff neither filed anything in response thereto, nor attended court on the date when the preliminary objection was set to be canvassed.

This ruling is in relation to the defendant's preliminary objection to the suit.

Essentially, the defendant expressed the view that the plaint was fatally defective because it had failed to comply with the mandatory provisions of Order 3 rule 5 (1) and (2) of the Civil Procedure Rules.

As the plaintiff was not the registered owner of the subject matter of the suit, the defendant submitted that he ought to have filed in court, the deed poll through which he had allegedly been authorized to institute these proceedings.

Following the plaintiff's failure to bring before the court such evidence of the instrument through which he had been authorized, the plaintiff was said to lack the requisite locus standi to prosecute this suit.

First, there is no doubt at all, that the plaintiff has expressly conceded that he is not the registered owner of the property which is the subject matter of the suit herein. In the light of that concession, it follows that the plaintiff ought to have taken the necessary steps to demonstrate how he came by the requisite locus.

In an endeavour to satisfy that requirement, the plaintiff asserted that he had been given authority, through a deed poll. However, he has todate not made available to the court a copy of the said deed poll.

The question that then arises is whether or not the production of the said deed poll was mandatory at this stage of the proceedings, as has been asserted by the defendant.

Order 3 rule 5 of the Civil Procedure Rules provides as follows;

" ***(1) Besides the recognized agents***

described in rule 2, any person residing within the jurisdiction of the court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general, and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in court."

It is significant to note that the marginal note to rule 5 makes reference to "**Agent to accept service**."

Secondly, it is important to also note that the said rule is expressly stated to be, besides the recognized agents described in Order 3 rule 2.

To my mind, the rationale for insisting that any person who is appointed as an agent, to accept service of process, should file the instrument so appointing him in court, is to protect respondents from having proceedings going on against them, under the impression that they had been served, through agents, whilst such alleged agents did not have requisite authorization to accept service of process.

Similarly, the requirement that the instrument be filed in court would also offer protection to the applicant, so that once he had served the recognized agent, he would have no reason to worry that

subsequent to such service, any proceedings that may take place could be set aside for non-service.

Finally, the court would be proceeding with a matter, in the knowledge that the process had been duly served. In other words, the court would be comfortable in the knowledge that the respondent would not deny his duly appointed agent, and by so doing, render useless such time and effort as the court would have already spent on the matter.

In my considered view, Order 3 rule 5 of the Civil Procedure Rules does not apply to a party who was instituting action on behalf of another person. I believe that such recognized agents are the subject of Order 3 rules 1 and 2 of the Civil Procedure Rules.

Rule 1 says that any application to or appearance or act in any court required or authorized by the law, may except where otherwise expressly provided by any law, be made or done by the party in person, or by his recognized agent.

Rule 2 then recites those persons who shall be deemed to be recognised agents of parties. Such persons include those who were holding powers of attorney authorizing them to do such acts on behalf of the parties.

Instructively, there is no requirement under Order 3 rules 1 or 2 of the Civil Procedure Rules, for the filing of the instrument, by which the agent had been appointed. Accordingly, I find that the failure by the plaintiff herein to file the instrument in court did not, by itself, render the plaint fatally defective.

Nonetheless, as the deed poll alluded to by the plaintiff did not authorize him to institute proceedings on behalf of the alleged registered proprietor of the suit property, the plaintiff had failed to demonstrate to the court, that he had the requisite locus standi to sustain this claim.

Even if it may not have been a requirement that he automatically files the instrument in court, once the defendant challenged him on the issue, the plaintiff ought to have responded to the challenge by filing the instrument in court.

For now, based on the plaintiff's own assertion in the plaint, the deed poll issued to him could only enable him to "***cultivate and even enter into contractual dealings in respect of land known as TRANS NZOIA/MARIDADI/395."***

In effect, the plaintiff has not as much as laid any claim to having been authorized to institute these proceedings. In the circumstances, I have no reason but to agree with the defendant, that the plaint is fatally defective. Accordingly, I do hereby uphold the notice of preliminary objection dated 29th December, 2006.

In the result, the suit herein is struck out, with costs to the defendant. The defendant is also awarded the costs of the Preliminary Point of Law dated 29th December, 2006.

Dated and Delivered at Kitale, this 18th day of June, 2007.

FRED A. OCHIENG.

JUDGE.