



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 878 of 2003

1. Land and Environmental Law Division
2. Civil Practice & Procedure
3. Preliminary Objection by the state
4. Subject of main suit
 - a) Land
 - b) Plaintiff and defendant No.1 Co- Administratrix to estate of deceased
 - c) Defendant No.1 originally held letters of grant on her own
 - d) Letters of grant intestate revoked and issued in joint names of plaintiff and 1st defendant
 - e) 1st defendant transfers land and sells same without consulting plaintiff
 - f) Plaintiff file suit (declaratory) against 1st defendant being co-administratrix to deceased estate.
2nd defendant being a new buyer of land
3rd and 4th defendants being the Registrar of Lands and the Commissioner of Lands
 - g) Files for injunction to restrain the 1st defendant from further selling of land
 - h) Injunction granted Emukule, J.- 21 August 2006.
 - i) Main suit – preliminary objection
 - j) Note related consolidated filed Hccc1029/06 (deconsolidated to be heard separately).
5. Preliminary Objection by state
 - a) Section 13A Government Proceeding Act not complied with
 - b) Both the Registrar of Land and Commissioner of Lands are Public Servants. They must be represented by the Attorney General and most subsequently be served with a 30 days notice before a suit

is filed against them.

6. Held:-

1: On the question who ought to be sued by a party ruling of:

Nemchanda Laghher Shah v Others

V

Applos Hiram Muma & the Commissioner of Lands

Hccc14/07 refers, Ang'awa,J unreported.

2. The Commissioner of Lands is sued in his name but is represented by the Attorney General.
3. The Registered Lands Act Cap.300 Laws of Kenya, The Registrar of Titles Act – Cap.281 Laws of Kenya, the person to sue is the Attorney General.
4. Notice of 30 days required to be served under section 13A of the Government Proceedings Act Cap.40 Laws of Kenya.
5. That Exception section 13A (3) of the Government Proceeding Act Cap. 40 Laws of Kenya in declaratory suits.
6. The Registrar of Title Act Section 19(3) where a 30 days notice need not be given.
7. In all other instances a notice would be required.
7. Case law
 - a) Nemchada Lagehhir Shah & Others V Applos Hiram Muma & The Commissioner of Lands.
Hccc14/07 Ang'awa J unreported.
 - b) Hudson Lase Wambulwa V Attorney General Hccc2714/87 Ringera J
 - c) Okwengu v Attorney General 1972 462
 - d) Mary Waithera v Attorney General CA 3088/85 Khamoni,J.
 - e) Riches v Deputy Public Prosecutor (1973) 2 ALL ER
 - f) Pashito Holding & Another v Ndungu & Others
Omolo,Akiwumi & Pall JJA
2007 (?) KLR (E & L) 295 (CA 135/97)
8. Statute Law
 - a). Government Proceeding Act Cap.40 Laws of Kenya section 19(3)
 - b) The Registered Lands Act Cap.300 Laws of Kenya.
9. Advocates:-

G.M. Gitonga & Co. Advocates for the plaintiff- present

J.W. Njage & Co. Advocates for the 1st defendant – present

N. Kugwa & Co. Advocates for the 2nd defendant- present

A.M. Sitima & Co. Advocates for the 3rd and 4th defendants - present

MARGRET WANJIRU OGADAPLAINTIFF

VERSUS

MARION NJERI KAMAU1ST DEFENDANT

JULIUS NGANGA NJIHIA2ND DEFENDANT

CHIEF LAND REGISTRARRD DEFENDANT

COMMISSIOENR OF LANDS4TH DEFENDANT

DR. VIOLET WANGUI KIMUIT5TH DEFENDANT

RULING

ON A PRELIMINARY OBJECTION

1. Objection

1. The state representing the Registrar of Lands (3rd defendant herein) and the Commissioner of Lands (4th defendant herein) raises a Preliminary Objection under section 13A of the Government Proceedings Act Cap. 40 Laws of Kenya, that prior to filing the suit before this court, the plaintiff, Margret Wanjiru Ogada, failed to issue a notice to the state of her intention to sue the 3rd and 4th defendants being 30 days.

II: Background of the Preliminary Object

2. Land Registered under the Registered Lands Act Cap.300 laws of Kenya had been so registered under the name of one Samuel Kamau Kimui (now deceased) being Loc.1/Kiriani/452 & Loc16/Ndungu Chege/979 amongst other properties. The 1st defendant is the second wife/widow to the deceased. She is alleged to have obtained letters of grant intestate for herself and her children without mentioning a first wife, who is the mother to the plaintiff a married daughter. The plaintiff applied for the revocation of the grant. A new letter of grant intestate was then issued in the joint names of the plaintiff and defendant No.1. The said defendant No.1 used – it is alleged, the 1st grant (already cancelled) and then transferred properties to herself sub-divided the land in question begging with sub-division Loc.1/Kiriani/452 to Loc Kiriani/814 and 815. She then sold the Loc Kiariani/814 to the 2nd defendant a male adult as the new owner of portion of the land, the Chief Land Registrar and the Commissioner of Lands a declaratory prayers and for orders of court for 3rd and 4th defendant to comply with the courts orders to rectify the Register.

4. This suit came into court by way of certificate of urgency to restrain the 1st defendant from continuing selling the land. It was pointed out to this court by the parties that there was another related case being Hccc1029/06 that was consolidated and or to be consolidated to this suit. The parties agreed to deconsolidate the two suits and that the same be heard separately.

III: Preliminary Objection

4. On the day fixed for inter-parties hearing the advocate for the state raised a Preliminary Objection whereby he stated that the suit against the 3rd and 4th defendants does not lie due to the fact that the plaintiff had failed to issue notice of 30 days to the Attorney General that they intend to sue the two defendants. This omission argued the state, was fatal. The 3rd and 4th defendants are civil servants and as such it is the Attorney General who must therefore be served with a notice before a suit is filed. As this had not served the case against the 3rd and 4th defendants should be struck out.

IV Argument

5. In reply the advocate for the plaintiff/respondent in this Preliminary Objection stated that the suit before the court is a declaratory one. Though the advocate mentioned section 13A (1) (2) he did not mention section 13A (3) which specifically states that no notice is required under the suit that are declaratory in nature.

6. The advocate for the 2nd defendant supported the case for the state and also sought for them to have the suit struck out on the Preliminary Objection.

V) Finding

7. On the question as to whom ought to be sued as a party and or locus of the government, I dealt with this issue in the case of:-

Nemchanda Laghher Shah & Others v Appllos Hiram Mine and the Commissioner of Lands Hccc14/07 Ang'awa J (unreported).

In a consolidated ruling of the point of locus of the state, I did state that the Commissioner of Lands is sued in his own name but by an amendment to the law, the said Commissioner of Lands is at all times represented by the Attorney General unless otherwise stated by the Commissioner of Lands.

8. Under the Registrar of Title Cap. 28 Laws of Kenya and the Registered Lands Act Cap.300 Laws of Kenya the person to sue is the Attorney General.

9. The principles therefore under section 13A of the Government Lands Act Cap 40 is that prior to filing suit a compulsory notice must be issued to the Attorney General. The state relied and demonstrated the compulsory need of a notice in the case law of Hudson:

Lase Wambulwa v Attorney General

Hccc2714/87, Ringera J

Mary Waithera v Attorney General

3088/1995 Khamoni J,

Okwengu v Attorney General (1972) EA 462 and Ridres V Deputy Public Prosecutor (1973) 2 ALL ER 935.

10. The plaintiff later came up with an authority he came across after arguments were complete. This court allowed him, with the consent of the parties to present his authority. This was the case of:

Pashito Holding & Another v Naguru & 2 Others

CA 138/97 (Omolo, Akiwumi & Pall JJA) (the authority may have been reported in 2007).

According to the plaintiffs advocate this authority clearly mandates that the commissioner of Lands be sued.

11. From the Government Proceeding Act Cap.40 Laws of Kenya, it is a requirement that a 30 days notice do issue. There are exception to this rule if you consider certain situation of the act. For instance under section 19(3) of the said act the Registrar of Titles on being sued through the Attorney General a party need not file a notice against the Attorney General prior to a suit being filed.

12. The case before me falls under the Registered Lands Act Cap.300 Laws of Kenya. The said act does not mention the Commissioner of Lands save that in administrative capacity he is the Registrar General on the aspect of supervision. He/she is not sued but the Attorney General is sued.

13. The issue herein is where the plaintiff is required to issue the Attorney General with a notice to sue of 30 days? The answer to this lies in section 13A (3) that deals with declaratory suits where such a suit is filed there need not be a 30 days notice simply because the dispute is between the parties and the Registrar of Lands sued in the name of the Attorney General abides the courts finding.

14. I do not think the case law of Pashito Holding (supra) is relevant in our case save the principles that a party must be heard.

15. In this case it is the Attorney General who should be named as a party and not the Chief Lands Registrar under the Registered Lands Act. The Commissioner of Lands should not be a party in this suit having been so brought under the Registered Lands Act Cap. 300 Laws of Kenya.

16. I accordingly, dismiss the Preliminary Objection on the grounds raised that a notice of 30 days is required to be issued to the Attorney General where the suit is one of declaratory nature under section 13A of the Government Proceeding Act.

17. There will be costs to the plaintiff.

Dated this 23rd day of July 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

G.M. Gitonga & Co. Advocates for the plaintiff- present

J.W. Njage & Co. Advocates for the 1st defendant – present

N. Kugwa & Co. Advocates for the 2nd defendant/respondent- present

A.M. Sitima & Co. Advocates for the 3rd and 4th defendants/applicant - present