



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT 52 OF 1998

M'ITIMITU M'MWITHIA..... PLAINTIFF

VERSUS

DIOCESE OF MERU REGISTERED TRUSTEE.....1ST DEFENDANT

ROMANO KOBIA.....2ND DEFENDANT

RULING ON A PRELIMINARY OBJECTION

1. The 1st Defendant in this suit has taken objection to the hearing thereof on the grounds below:-

“1)This suit is a clear and deliberate affront to the mandatory Provisions of Section 34 of the Civil Procedure Act Chapter 21 Laws of Kenya

Meru HCCA No. 100/92 (M'ITIMITU M'WITHIA VS DIOCESEOF MERU) having been determined by the late MR. JUSTICE C.O. ONG'UNDI on 19th July 1995 in which appeal he set aside the judgment of the trial court (lower court) in Meru CMCC No. Chief Magistrate, SOLOMON A. WAMWAYI, had absolutely no jurisdiction, to improve and/or add on the said judgment by ordering that land parcel NO. TIGANIA/THANANGA/252 do revert to the Plaintiff herein, while purporting to give the High Court judgment clarity as he did on 1st April 1996.

3) Even assuming MR. SOLOMON A. WAMWAYI was acting as a Deputy Registrar, which he was not, then the orders he issued on 1st April 1996 were substantive orders issuable only by the high Court and not a Deputy Registrar as Promulgated vide O.XLVIII of the Civil Procedure Rules.

4) This present suit is an abuse of the court process and should be struck out with costs to the 1st Defendant.”

2. Before turning to the arguments made, I deem it proper to give a brief background to the suit which is as follows:-

The Plaintiff was the Appellant in HCCA 100/1992 and the 1st Defendant was the Respondent. The original suit was RMCC No.180/89 and I note that the orders on Appeal (Ong'udi J.) made on 19.7.1995 was that since the learned trial magistrate failed to correctly interpret S.6 of the Land Control Act, his decision was wrong and that the judgment of the court below was set aside and the Appeal was allowed.

The effect was that the order granted to the 1st Defendant for specific performance of transfer of land parcel No. Tigania/Thananga/252 and an order that the Plaintiff do sign all transfer documents relating to the land, was also set aside.

3. On 1.4.1996, in a Ruling delivered upon unclear proceedings within the Appeal, Solomon Wamwayi, Chief Magistrate stated as follows:-

“I have listed to the submissions of Learned Counsels and I am of the opinion that in view of the High Court Judgment which set aside the judgment of the Lower Court, it is clear that the Land Reg. No. TIGANIA THANANGA/252 reverts to the Appellant one M’ITIMITU M’MWITHIA and I therefore order that the Executive Officer of this court do sign the transfer papers and Application for consent to facilitate transfer of the said Land Ref. No. TIGANIA/THANANGA/252 to the said M’ITIMITU M’MWITHIA.”

4. The present suit was then filed to revert the land back to the Plaintiff because the 1st Defendant had long transferred it into the name of the 2nd Defendant by the time S. Wamwayi Esq. made his orders.
5. I have heard submissions by counsel and read the authorities cited but my view is that the objection is a whole ado about nothing. S.34 of the Civil Procedure Act provides as follows:-

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

3) Where a question arises as to whether any person is or is not representative of a party, such question shall, for the purpose of this section, be determined by the court.

Explanation. – For the purposes of this section, a plaintiff whose suit has been Dismissed, are parties to the suit.”

6 The present suit from a casual glance at the Plaint relates to an attempt by the Plaintiff to nullify the transfer made to the 2nd Defendant. The suit may, when evidence is called, turn to the process by which the 1st Defendant acquired title but in the end will be determined on whether the 2nd Defendant obtained a good title from the 1st Defendant and whether the same should be nullified. Whether Solomon Wamwayi Esq. Had any right to interpret the judgment of On’gudi J. in HCCA 100/1992 will only be one piece of evidence whole value will be considered in evidence. It is not the fulcrum of the case as it is made out to be.

6. In any event, once the Appeal Court determined the matter, it was open to parties to seek interpretation of the judgment with either the Appeal itself and/or within RMCC 180/89 and not by separate suit which is a matter well within the purview of S.34 aforesaid. I see no such attempt within this suit and the references in grounds 1, 2, and 3 to the Ruling of the learned Chief Magistrate within this suit, and at this state, is one of those matters that Newhold, P. derided in the following words;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite properly by the way of preliminary points.....The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs, and on occasion, confuse the issue. The improper practice should stop” - See Mukisa Biscuit Co.Ltd vs West End Distributors [1969] E.A 696 at Page 701.”

8. These words aptly to this case and I should very quickly overrule the objection with costs to be paid by the Defendants in equal share to the Plaintiff.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 19th day of September 2007

ISAAC LENAOLA

JUDGE

In the Presence of

Mr. Kariuki Advocate for the Plaintiff

N/A Advocate for the Defendant

ISAAC LENAOLA

JUDGE