



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 153 of 2004

KIMAIYO ARAP TIONY:.....PLAINTIFF

VERSUS

FREDRICK KEMEI & 4 OTHERS:.....DEFENDANTS

RULING

The plaintiff filed an application dated 14th December,2004 seeking injunctive orders against the Defendants regarding to a parcel of land known as LR.NO.10492 measuring 40.0 acres.

The 1st – 4th Defendants lodged a Notice of preliminary objection on points of Law against the application. The Notice raised the following grounds:-

1. That the plaint/Applicant does not have locus standi in the suit because he is not the legal owner of L.R.No.10492/2.
2. The plaintiff/Applicant has never filed any criminal complaint on the alleged cutting of barbed wire and damage of fence and removal of 14 wooden posts.
3. The claim in the suit is at variance with the claim in the application.

On its part the 5th Defendant filed a Notice of Preliminary objection raising the following grounds:-

1. The plaintiff lacks the locus standi and capacity to institute this suit.
2. The suit raises no cause of action against the 5th Defendant.
3. The suit contravenes the provisions of the Physical Planning Act, the Land Acquisition Act as well as the Land Disputes Tribunal Act.
4. In consequence the entire suit is an abuse of the court process.

The two Notices of Preliminary objections came before me for hearing on 29th March,2006. At the commencement of the arguments by Mr. Miyianda counsel for the 1st – 4th Defendants, I gave the following directions:-

.....

“ On the basis of the principles laid down in MUKISA BISCUITS., decision of the court of Appeal, preliminary objections shall raise pure points of law. No facts particularly those that are or may be in contest is allowed to be referred to. The court cannot look at any evidence when considering the Preliminary Objections. For purposes of Preliminary Objections on points of Law, it is deemed that the statements or allegations of fact made by the plaintiff are correct or admitted. This is only in respect of the preliminary objection. Other matters even which include points of law that have to be established by facts will have to be used in the reply or submissions.

As a result, counsel should desist from referring to the facts in their defences or Replying Affidavits, if they are contentious.”

As a result, Counsel for the 1st – 4th Defendants abandoned the Notice of Preliminary objection. The counsel for the 5th Defendant, Mr. Shivaji then prosecuted Grounds 1 and 3 of his Notice. The fifth Defendant submitted that the plaintiff’s suit is based on trespass and yet the suit property vests in not only in the plaintiff but many other persons who are not parties in the suit. It was submitted that the allegations of trespass in this case translates to a cause of action founded on public nuisance as contemplated by section 61 of the Civil Procedure Act. As a result it is only the Attorney General who can institute such proceedings. On this ground, it was submitted that the plaintiff did not have the locus standi to institute this suit.

Another ground was that under the Physical Planning Act of 1966, where a party is aggrieved by any act of development his remedy lies in filing a complaint with the Local Liaison Committee and has recourse to the High Court by way of an appeal.

The preliminary objection was opposed by the plaintiff. I have considered the preliminary objections raised and the submissions by counsel. The plaintiff claims that he is the Legal owner of the suit property. This is a question of fact which is subject to proof. He claims that Defendants have jointly and severally trespassed on his land and damaged fence and removed barbed wire and fencing posts. He also claims encroachment on his land and digging of a road by the Defendants.

This is an action by the plaintiff as an alleged owner for trespass and seeks a permanent injunction against the Defendants. It is a simple claim and cause of action. It has not yet been determined whether the land is owned by more than one person, other than the plaintiff. This is a contentious matter for determination during the hearing of the application or at the trial. As a result the issue of whether this is a suit based on public nuisance cannot be the subject matter of a preliminary objection on a point of law.

The plaintiff has not invoked the Physical Planning Act and if it is an issue to bring this statute in application then there are no facts pleaded by the plaintiff to this effect. It is clear that if the Defence of the Defendants shall bring this Act into play then facts and evidence will have to be laid before the court.

I hold that the preliminary objections herein have no merit whatsoever. The purported points of law are in fact not pure points of law. They are issues that can be used to oppose the application at the hearing thereof.

As has been advised in many cases by the Court of Appeal and this court, the raising of Preliminary Objections must be done sparingly and only where there is merit, that the grounds raised pure points of law. Parties ought not frame grounds or points which raise matters of fact and contention to appear to be points of law. The unnecessary use of Preliminary Objections appears to be a trend on the rise in this court.

It should be noted that such a trend has the tendency to protract and/or delay the expeditious disposal of suits to be heard on their merits.

I do hereby dismiss both Preliminary objections raised by the Defendants with costs to the plaintiff.

DATED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF MAY,2006.

M.K. IBRAHIM

JUDGE

30/05/06

Coram

Ibrahim J

C/C - Chelanga

Mr. Mwinamo for the 5th Defendant

Mrs. Wambua for the plaintiff

Mr. Miyienda for the 1st – 4th Defendant.

Ruling delivered in their presence.

M.K. IBRAHIM

JUDGE