



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

**Civil Case 804 of 2005**

**FARIDA ANWERALI TEJANI.....PLAINTIFF**

**VERSUS**

**SHELLINA JAHANGI RALI TEJANI.....DEFENDANT**

**RULING**

This Ruling is delivered in the Notice of Preliminary Objection dated 22<sup>nd</sup> July, 2005 filed by the 1<sup>st</sup> Defendant herein, challenging the Plaintiff's suit which was initially filed by way of an Originating Summons dated 29<sup>th</sup> June 2005. The Preliminary objection also addresses itself to the Plaintiffs Chamber Summons dated 29<sup>th</sup> June 2005 and 14<sup>th</sup> July 2005 respectively.

The Originating summons as amended seeks, inter alia, a declaratory order to the effect that the Plaintiff is entitled to ownership of the whole of L.R. No. 209/34/3 Masari Road, and a prohibitory order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from alienating, disposing of or otherwise howsoever dealing or interfering with the suit premises. It also seeks a prohibitory injunction restraining the Registrar of Government Lands from accepting or registering any conveyance, charge, lease or other document likely to interfere with the Plaintiff's right, title and interest in the suit premises.

The preliminary points raised in the Notice of Preliminary objection are that:

1. The 1<sup>st</sup> Defendant is no longer the owner of the half share of the suit premises and for that reason, the Plaintiff has no cause of action against the 1<sup>st</sup> Defendant and the injunction orders sought against her cannot issue.
2. That the Plaintiff has no cause of action against the 3<sup>rd</sup> Defendant
3. That the Amended Originating summons is fatally and incurably defective for purporting to sue a government officer other than the Attorney General as required under Section 12 (1) of the Government Proceedings Act, Chapter 40 of the Laws of Kenya.
4. That the proceedings under the Originating Summons and the Chamber Summons are not maintainable being in contravention of Section 16(1)(i) and (2) of the Government proceedings Act which preclude the grant of injunction against government officers.
5. That the amended Originating Summons is fatally and incurably defective for failure to comply with the provisions of Order XXXVI Rule 3D(2) of the Civil Procedure Rules in that it is not supported

by an Affidavit to which an extract of title is annexed.

I have considered the submissions made by Counsel on both sides and I find myself compelled to consider first and foremost, the submission by the plaintiff's Counsel that the preliminary objection raised herein does not meet the essentials of a preliminary objection as set out in the celebrated case of ***MUKISA BISCUITS VERSUS WEST END DISTRIBUTORS (1969) E.A. 969*** in that it does not raise pure points of law. The said Court of Appeal decision clearly spells out that a preliminary objection must be one that raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. Also that it cannot be raised ***if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion*** (underlining my own).

Looking at the very first objection it is clear that the ownership of the suit premises is disputed and indeed the Plaintiff's right of action is challenged. The Plaintiff's claim is based on the contention that she is entitled to ownership of the suit premises in adverse possession which in itself is a disputed fact, provable only by evidence. She also seeks injunctive orders which orders can only issue pursuant to the exercise of judicial discretion by the court. The Defendant's contention that the suit property has changed hands and that no claim can lie against her for that reason is also an issue in dispute. Clearly, no assumption can be inferred that all the facts pleaded by the Plaintiff are correct, even if the 1<sup>st</sup> Defendant has sought to challenge the competence of the suit and the Chamber Summons on points of procedure.

Considering the points raised in the preliminary objection and submissions by counsel herein, it is clear to me that what the 1<sup>st</sup> Defendant desires is the striking out of the Plaintiffs pleadings which on the facts pleaded can only be entertained in an application brought under order VI Rule 13(3). The Defendant had in fact attempted to do this in her application dated 18<sup>th</sup> July 2005 which appears to have been abandoned at the hearing of 24<sup>th</sup> October 2005.

I have seen the Directions given by my learned brother Mr. Justice Ojwang regarding the present Notice of Preliminary Objection and the 1<sup>st</sup> Defendant's Chamber Summons of 18<sup>th</sup> July 2005 wherein he was of the view that since the two applications had a common purpose, the hearing of the Preliminary Objection alone would suffice to meet that end. With all due respect I beg to differ with that finding in view of what I have already stated. I hold the position that every provisions of the Civil Procedure has its own purpose even if the end result is the same. Seeing what is contained in the Notice of Preliminary Objection I would have been of a different view and would perhaps have ordered that the Chamber Summons, be heard in lieu of the Preliminary Objection particularly since the same was first in time and challenged the plaintiff's cause of action in a suit where injunctive orders are sought, among other reliefs.

I find that the Preliminary Objection fails for reasons given hereinabove. I therefore overrule the same and order that the Plaintiffs Application dated 14<sup>th</sup> July 2004 as well as the Amended

Originating Summons do proceed to hearing in that order on dates to be taken at the Registry. I award costs of the preliminary objection to the plaintiff.

Dated and delivered at Nairobi this 24<sup>th</sup> day of May, 2006

M. G. MUGO

JUDGE

Delivered in the presence of:

Mr. Karanja for the Plaintiff

Ms. Nagi for the 1<sup>st</sup> Defendant