



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Suit 57 of 1995

M'ARIMI RUBWA..... PLAINTIFF

VERSUS

RUTERE NKANATA DEFENDANT

RULING ON A PRELIMINARY OBJECTION

1. The Preliminary Objection by the Defendant to the hearing of the suit herein was filed on 25.10.2005 and has two grounds, namely that: -

(a) The suit herein is in contravention of the express and mandatory provisions of Section 26(3) of the Land Consolidation Act, Cap. 283 as read together with the Section 11 of the Civil Procedure Act, Cap 21.

(b) The suit herein is in contravention of the express authority granted in the letter of consent filed together with the plaint herein.

2. The suit was filed on 1.3.1995 and in it the Plaintiff M'Arimi Rubwa claims Plot No. 1329 Mweru II Adjudication section and general damages for alleged trespass by the Defendant. Because of the express provisions of s.30 of the Land Adjudication Act, Cap 283, the Plaintiff had to obtain a written consent of the Adjudication Officer for Meru before instituting suit which consent was obtained and is dated 1.12.1994. It is attached to his Plaint and is addressed to the "**District Magistrate/Resident Magistrate Law Court, Meru.**"

3. With that brief background, counsel for the Defendant now argues that s.26(3) of the Land Consolidation Act was not followed at the time of institution of the suit herein because firstly, the Plaintiff should have applied to the Resident Magistrate's court for revision of the amount awarded by the Adjudication Officer and secondly under s.11 of the Civil Procedure Act, any suit ought to be filed in the lowest court competent to try it and in this case to the Resident Magistrate's Court.

4. The other point made and relating to the consent Letter aforesaid is that it is addressed to the Resident Magistrate's Court and the suit having been filed in the High Court, the said consent is invalid and for all these reasons the suit ought to be struck out.

5. The response on behalf of the Plaintiff is that the suit was properly instituted with a valid consent under s.30 of the Land Adjudication Act, Cap.284 and the Land Consolidation Act cannot apply in such a case. Further, that s.11 of the Civil Procedure Act does not oust the provision that the High Court has jurisdiction to determine the issues in contention.

6. To understand the issues raised, it would be important to revisit the Plaint and particularly paragraphs 5 and 6 thereof which provide as follows:-

“5. The Plaintiff is the owner of Land Parcel Number 1329 under Kimeru customary Law which has been unlawfully and without lawful cause been allocated to the defendant.

6. That land parcel Number 1329 has been unlawfully excised from the Plaintiff’s Land Parcel No. 6.”

7. In answer to these averments, the Defendant at paragraph 4 and 5 of the statement of Defence filed on 13.5.1996 avers as follows: -

“4. The defendant denies paragraph 5 of the plaint and puts the plaintiff to strict proof thereof. The defendant avers that at all times the parcel No.1328 Mweru II has been given by the clan and confirmed by Land Registrar.

5. The defendant admits that he is in occupation of parcel No. 1329 Mweru II adjudication section but denies it belongs to the Plaintiff but avers that it belongs to him/[defendant]”

8. What emerges from these averments is that the suit land was clan land and during consolidation and ascertainment of rights and interests over the land, a dispute arose over the particular portion. I note from the consent letter dated 1.12.1994 that the Plaintiff has complaints against four (4) persons, the Defendant included and apart from his parcel No. 6 Mweru II Adjudication Section, five (5) other portions of land are affected and none of them is land parcel No. 1328 or 1329 as are pleaded in the plaint and Defence. The parcels are Nos.145, 749,863, 881 and 920 Mweru II Adjudication Section. So much for those issues of fact which are rather unclear.

9. As to whether the Plaintiff is properly before court, I do not know how s.26 of the Land Consolidation Act applies to this case. That section relates to **“Objections to the Adjudication Register”** and applies where a party considers the Register to be **“inaccurate or incomplete”** or is aggrieved by the allocation of land as entered in the Adjudication Register. S.26(3) of that Act which is relied on in this objection estops any appeal from the decision of the Adjudication Officer as to rectification of the register or an award of compensation in lieu of rectification. I do not see any bearing of those matters to the issue in dispute here.

10. To my mind, s.8 of the Land Consolidation Act has the same effect as s.30 of the Land Adjudication Act as both sections estop any court from hearing any dispute as to **“proceedings in which the ownership or the existence under native law and custom”** in land adjudication areas and land adjudication sections until the Register has become final and a consent is given by the Adjudication Officer to the institution of a suit in the case of a Land adjudication area. The consent letter dated 1.12.1994 is a consent **“under s.30 and 8(1) of the Land Adjudication Act”** but in fact it can only be under s.30 of the Land Adjudication Act as read with s.8(1) of the Land Consolidation Act. In effect the Plaintiff is properly before the court to that extent and I do not see any serious issue raised by the first limb of the Preliminary objection and I have said that s.26(3) of the Land Consolidation Act is of no use to the Defendant as the dispute is one of ownership under customary law which can be dealt with by courts of law hence a proper consent has been obtained to institute or proceed with a suit in that respect.

11. The second issue is even simpler; granted s.11 of the Civil Procedure Act applies to direct that all suits should be tried in a court of the lowest jurisdiction at the first instance but I do not understand that section to oust the original jurisdiction conferred on the High Court by s.60 of the Constitution and where there is a conflict with s.11 aforesaid then the latter shall prevail. In any event if the High Court on application of parties or on its own motion, sees the need to transfer a suit pending before it for trial and disposal by a subordinate court, it can do so by power conferred by s.18 of the Civil Procedure Act without necessarily striking out the suit as is now sought by the Defendant.

12. I am convinced that the objection as framed and argued cannot stand and I shall over rule it with costs to the plaintiff.

13. This being an old suit, parties should now proceed and fix hearing dates for its hearing and quick disposal.

14. Orders accordingly.

Dated, signed and delivered in open court at Meru this 27th . Day of September 2006

ISAAC LENAOLA

JUDGE

In the presence of

N/A Advocate for the Plaintiff

Mr. Akwalu Advocate for the Defendant

ISAAC LENAOLA

JUDGE