

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 83 OF 2003

PETER MUTYANGUA SILA :::::::::::::::::::: PLAINTIFF

VERSUS

JOSEPHINE MWIKALI KIMEU

MALEVE MUTUMBA :::::::::::::::::::: DEFENDANT

RULING

The plots in dispute 24540 and 2500 Ithaeni fall under the Ithaeni Adjudication Section of Machakos District. Under S.30 of the Land Adjudication Act, no suit can be filed in court without consent from the Adjudication Office of the area. The plaintiff and another sought the consent of the Adjudication Officer of the area to file a suit in court which consent was denied. They then went to the High Court in Miscellaneous Application No. 215/2001 where on 27.3.2003, this court issued an order of mandamus compelling the Land Adjudication and Settlement Officer Machakos to grant consents to the applicants to file suit in respect of the above plots. It is as a result of that order that the plaintiffs filed the present suit. The applicant also filed an application under certificate of urgency seeking orders of injunction to restrain the defendants from interfering with the said plots. The respondents filed notice of preliminary of objection to the suit contending that no valid consent has been issued by the Adjudication Officer.

I have considered arguments by both the counsel for Respondents and that of the plaintiff/applicants.

The respondents contends that the purported consent issued as per annexure PMS 4 is not directed to the applicant but to the Deputy Registrar of the High Court Machakos who has not interest in the land. I do agree that the consent is addressed to the Deputy Registrar. I believe this arose because the consent is issued pursuant to the court's order. This is obviously a mistake but the court should not merely look at the form but the intention. The Land Adjudication Officer was compelled to issue the consent. In his mind he has done it though directed at the wrong party. That does not mean that there is no consent. This is something that merely needs rectification by the Adjudication Officer addressing the consent to the correct party. That minor discrepancy cannot serve to make the suit a nullity.

Another angle to the preliminary objection is that in the same purported consent, the 1st respondent Josephine Kimeu was never a party included in the consent by Adjudication Office and so there is no consent to institute a suit against her. I do agree that the 1st respondent was never party to the application made to court in Misc. 215/2001. The application was against Maleve Mutumba and the consent issued is also specific that the suit is against Maleve Mutumba and so the suit against 1st respondent Josephine Kimeu is improperly before this court and should be struck out.

The other issue raised in the preliminary objection is that once the Land Adjudication Officer had actually acted by refusing to give consent to the applicant/plaintiff to file suit, that order of refusal should have been quashed by an order of certiorari before the court could be moved for an order of mandamus directing the Adjudication Officer to act and it is further argued that an order of mandamus cannot grant a right to sue. Looking at the ruling of this court dated 27.3.2003 (PMS 3) the court ordered as follows; "an order of mandamus be and is hereby issued compelling the Land Adjudication and Settlement Officer Machakos to grant consent to the applicant's to file suits in respect of plot Nos. 2454 and 2500. "it is in obedience to this order that the Land Adjudication Office issued the consent annexure PMS 4. What the counsel for Respondent is doing is trying to challenge the order given by this court which he can not do in this suit. He should have applied for review or appealed against that order. The court's order stands and there is no basis for counsels objection and that angle of his objection must fail.

The second ground of the preliminary objection was not argued as it was going to have merits of this application pending before this court which was not being heard.

Having agreed with the objection that the 1st defendant was not included in the consent from Adjudication Officer, the suit against her is struck out and the preliminary objection succeeds to that extent.

As regards the defects noted in the consent, the court will look at the substance other than the form and find that there is a valid consent issued by the Adjudication Office and the Adjudication Officer is ordered to amend it by addressing it to the rightful parties and include all parties who sought the consent. The plaintiff should also amend the pleadings to include all the parties who sought the consent to sue the defendant. That being so, the plaintiff is ordered to pay costs of the objection.

Dated, read and delivered at Machakos this 12th day of February, 2004.

R. V. WENDOH

JUDGE