



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO 204 OF 2004

AGNES LOSHEN PARSAPIYO PLAINTIFFS/APPLICANTS

VERSUS

OLOISHO-OIBOR GROUP RANCH

REGISTRAR OF LANDS

KAJIADO DEFENDANTS/RESPONDENTS

RULING

The Plaintiffs filed this suit against the Defendants seeking to restrain the Defendants from subdividing, allotting, alienating, transferring or otherwise interfering with land parcel No. KAJIADO/NTASHART/475 measuring 340 hectares. I will hereinafter refer to that property as “the suit land”. In their Complaint, the Plaintiffs averred that the suit land was registered in the name of David Parsapiyo Parsitau to hold in trust for other members of his family. The 1st Plaintiff is his brother while the 2nd Plaintiff is his (David’s) wife. In paragraph 6 of their Complaint, the Plaintiffs stated that the action was brought by them as beneficial owners of the suit land.

At the time of filing the suit, the Plaintiffs also filed an application under Order XXXIX of the Civil Procedure Rules seeking interlocutory relief to preserve the suit land pending the hearing and determination of the suit. When that application came up for hearing, Mr Wandaka for the 1st Defendant urged preliminary points which he said were set out in paragraph 3 of the Replying Affidavit of Moses Lekoiya Timan sworn on 20th April, 2004. What were those points? To make matters simple, I will reproduce the contents of that paragraph:

“THAT I am informed that this suit is incompetent as the 1 st Defendant cannot be sued on (sic) its own, the alleged Plaintiffs have no capacity to sue for a person who is not presumed dead by the law and it would appear there is no Notice to sue the second Defendant as no Notice is filed together with the suit and these grounds will be raised as a Preliminary Objection to the suit and application.”

Mr Wandaka argued that the suit was incompetent for the reasons given in the above objections. He argued that the Plaintiffs were not entitled to bring an action on behalf of a person who had disappeared

for less than 7 years as in this case since the law only presumes a person to be dead after the expiry of more than seven years. Citing the case of *Francis Karani Elijah & Others vs The Chairman (KANU) & Others HCCM No 238 of 2002* he argued that the suit was also incompetent as the law did not allow the 1st Defendant to sue or be sued in its own name. Finally, he argued that the suit was also incompetent since no notice to sue the Government had been given. Mr Ocharo, for the Plaintiffs, on his part, argued that the Plaintiffs had sufficient locus standi as they did not bring the suit on behalf of David but on their own behalf as beneficiaries of the suit land. I agree that the Plaintiffs appear to have a sufficient cause of action in the circumstances of this case. They have averred that the suit land was registered in the name of David on behalf of the family of which they are a part. David disappeared.

He is not available to agitate his rights and those of persons who claim through him. He has not disappeared for a period sufficient to presume him dead. I think this is a proper case in which the Plaintiffs as beneficiaries of the suit land are entitled to protect their rights without the absentee trustee (See Order XXX Rule 1 of the Civil Procedure Rules).

As to whether the 1st Defendant could be sued in its own name, Mr Ocharo pointed out that that Defendant had been erroneously described as a society registered under the Societies Act. He said that the 1st Defendant was in fact a land group registered under the Land (Group Representatives) Act (Cap 287) which is empowered to sue and be sued in its corporate name (See Section 8 of the Act). That is correct and it shatters the second point of the objection. The erroneous description of the 1st Defendant in the Plaint cannot change its proper identity.

Finally, as concerns whether or not a notice had been issued to the 2nd Defendant or not, I think this is a question of fact which cannot be competently resolved as a preliminary point. Mr Ocharo said before me that a notice had in fact been given. That aside, I do not see how the need for notice would affect the 1st Defendant when in fact there was no allegation that default in the case would affect the suit against it. I say this because the complaint in respect of notice was raised concerning the second defendant only. If there was indeed a default in that respect, I do not see how this would affect the Plaintiffs' claim against the 1st Defendant as it was not alleged that a similar notice was required in respect of it.

From the foregoing, I do not think that the Preliminary Objection raised by the 1st Defendant's Counsel is merited and I overrule the same with costs to the Plaintiffs.

Dated and delivered at Nairobi this 7th day of July, 2004.

ALNASHIR VISRAM

JUDGE