

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 196 OF 2004

MONKIMAYAT OLE NAANDUKILA & 19 OTHERS.....PLAINTIFFS

VERSUS

JOHN TANTE OLE MESHUKO & 25 OTHERS.....DEFENDANTS

RULING

The Plaintiffs, who are twenty in number, filed suit against the Defendants, who are twenty six in number seeking the orders of this Court to permanently restrain the Defendants from dealing with certain parcels of land within Kipise adjudication area. Contemporaneous with filing the said suit the Plaintiffs made an application under the provisions of **Order XXXIX Rules 1, 2, 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the orders** of injunction to restrain the 1st to the 23rd Defendants from evicting the Plaintiffs from certain parcels of land within the Kipise Land Adjudication area pending the hearing and determination of the suit filed by the Plaintiffs.

When the Defendants were served with the application, they filed a Notice of Preliminary Objection to the entire suit. The said preliminary objection was to the effect that the suit filed by the Plaintiffs contravened Section 34 of the Land Adjudication Act. The other objection raised by the Defendants was that no grant of letters of administration was issued to Rasita ole Naenkop in respect of the estate of the late Leiyoma ole Naenkop and therefore the said Rasita ole Naenkop had not capacity to sue on behalf of the Estate of the deceased and on behalf of the rest of the Plaintiffs. The Defendants have further stated that the Plaintiff's suit was bad in law and misconceived as the decision of the Land Arbitration Board (Kipise Section) cannot be challenged by way of a Plaint in an ordinary suit. Finally, the Defendants objected to the Plaintiffs suit, as in their view, the Plaintiffs had not come to Court with clean hands and therefore were not entitled to the equitable remedy of injunction.

Mr Ngaah Learned Counsel for the Defendants argued the Preliminary Objection and urged this Court to allow the said objection. Mr Kerongo Learned Counsel for the Plaintiffs opposed the Preliminary Objection. It was the Plaintiffs Submission that the suit filed by the Plaintiff was competent and should be allowed to proceed. I have considered the rival submissions made by Counsel for the Plaintiffs and Counsel for the Defendants. I have also read the pleadings filed in Court by the parties to this suit. It is not in dispute that the subject matter of this suit is the decision of the Land Adjudication Arbitration Board which awarded the Respondents certain portions of land within Kipise Land Adjudication Area. The Defendants are contending that the Plaintiffs ought to have made an application for Judicial Review challenging the decision of the Kipise Land Adjudication Arbitration Board instead of filing a Plaint. The Defendants further contend that the Plaintiffs have sought to circumvent the provisions of the **Law Reform Act and Order LIII of the Civil Procedure Rules** that require leave to be sought within six months after the decision sought to be challenged is made by filing this suit by way of a Plaint.

The Plaintiffs disagree with the Defendants submission. According to the Plaintiffs, they have properly come to Court by way of a Plaint. It was their submission that the Land Adjudication Act did not provide a specific procedure by which a litigant was to come to Court. The Plaintiffs submitted that what was required by the said Land Adjudication Act was for written consent to be given by the Land Adjudication Officer before a suit could be filed by an aggrieved party. The Plaintiffs submitted that they had complied with this requirement and therefore they were competent before the Court.

I have considered the rival arguments made by the parties to this suit. The issues raised by the Defendants are issues of fact interwoven with issues of law. The Plaintiffs have given a different version on the way they perceive the facts in issue to be. A preliminary objection can only be raised where there is no dispute as to what constitutes the facts of the case. A preliminary objection normally raises issues of

law when the facts are assumed not to be in dispute. In **Mukisa Biscuit Co. –versus- West End Distributors [1969] E. A. 696** at page 701, Sir Charles Newbold, the then President of the Court of Appeal of East Africa stated as follows as regards Preliminary Objections:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In the instant suit, several issues which were canvassed by both parties to the Application are contentious. For instance, the Defendants state that some of the Plaintiffs were not given written authority by the Land Adjudication Officer to file this suit. On the other hand the Plaintiffs contend that all the Plaintiffs were authorised to file the suit. This is not an issue that this Court can determine at this preliminary stage. Evidence has to be adduced either by affidavit or orally to prove or disprove the fact.

I have further read the Sections of the ***Land Adjudication Act*** referred to me by the Counsels for the Plaintiffs and Counsel for the Defendants. While it is true that the decision of Land Adjudication Arbitration Board may be challenged by way of Judicial Review, there is no Section of the said Act which bars a litigant from filing suit by way of Plaint if a party is aggrieved by the decision of the said Land Adjudication Arbitration Board. I am not prepared at this stage to shut out the Plaintiffs from the seat of justice on the grounds raised as a Preliminary Objection by the Defendants. In the circumstances of this case, it would only be just and fair to hear the Plaintiffs application on merit.

For the above reasons the Preliminary Objection is disallowed. The Plaintiffs shall have the costs of the objection.

DATED at NAKURU this 1st day of October, 2004.

L. KIMARU

AG. JUDGE