

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 733 OF 1989

ANTHONY ATHANA NGOTHO :::::::::::::::::::: PLAINTIFF
VERSUS
MICHAEL MWAMBYA VITA MWAMBYA :::::::::::::::::::: DEFENDANT

RULING

By a notice of Motion dated the 31.10.2000 and filed on the same day, the applicant is asking for orders that the applicant be found as an interested party and for a further order the court reserves its judgment.

The plaintiff/Decree holder filed a notice of Preliminary Objection on points of law. For the objector Mr. Machira submitted that the application is incurably defective in that he order relied upon applies where there are proceedings, which have not been determined yet. In this application the proceedings were determined yet. In this application the proceedings were determined. He further argued that the matter was now resjudicata. The intended Party has no loci standi in the case as he purports to have bought the land in 1999 long after the title documents had been issued o 1988.

Mr. Onyugi the learned Counsel for the applicant contented that this was not a proper preliminary objection based on law as the matters being relied upon are subject to verification.

A Preliminary Objection must raise a point of law which is argued on the presumption that all the other facts are correct. The point raised by Mr. Machura that the land in dispute is an agricultural www.kenyalawreports.or.ke land and therefore any transaction relating to this land must have a Land Control Board consent of the area. This is a point of law. Any transaction without the consent is null and void. The applicant did not say that he had such consent and it follows that his agreement with his vendor is not valid. Equally the fact that the plaintiff has a title deed to this land in a point of law which does not need explaining.

I agree with the submissions by Mr. Onyugi that the court has the power to recall decrees passed ex parte. I also accept his submissions that Order 44 rule 1 of the Civil Procedure Rules may allow the applicant to make the application he had filed. But the transaction the applicant seeks to bring before the court is null and void by operation of the law. It follows therefore that the application is incompetent.

I therefore find that the objection is valid and it is upheld. The application is dismissed with costs to the Respondent.

Dated this 4th Day of January 2001.

KASANGA MULWA

JUDGE