



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. E052 OF 2021

MWAMBAJI KAILO MTUTO.....PLAINTIFF

VS

FREDRICK NDUNE JAPHET.....1ST DEFENDANT

MBEYU KALONGO.....2ND DEFENDANT

RULING

This ruling is in respect of an Application dated 19th June 2021 and a Preliminary Objection dated 28th June 2021 seeking for the following orders: -

a) *Spent*

b) *THAT this Honourable Court be pleased to grant an order of injunction restraining the Defendants/ Respondents by themselves, their servants, agents, family members and/or employees or otherwise however from trespassing, evacuating, surveying, occupying and/ or dealing in any manner whatsoever thereon and or in any other way purporting to alienate the property Plot No. 354 Mikahani/ Mawema Bomu/ Chonyi adjudication Section belonging to the Plaintiff/ Applicant pending inter partes hearing and determination of this Application.*

c) *THAT this Honourable Court be pleased to grant an order of injunction restraining the Defendants/ Respondents by themselves, their servants, agents, family members and/or employees or anyone claiming under the Defendant or otherwise howsoever from trespassing, evacuating, occupying and/ or dealing in any manner whatsoever thereon and or in any other way purporting to alienate the property Plot No. 354 Mikahani/ Mawema Bomu/ Chonyi adjudication Section belonging to the Plaintiff/ Applicant pending the hearing and determination of this application.*

Before the application could be heard and determined the Defendant filed a Preliminary Objection on the grounds that the application and suit is bad in law, misconceived and an abuse of the court process and that the Plaintiff lacks the locus standi to sue.

On the 27th July, 2021, the court gave directions that both the Notice of Motion and the Preliminary Objection disposed of together by way of written submissions which were duly filed.

The court will therefore deal with the Preliminary Objection first which has the effect of disposing of the suit if it is found that it has merit.

DEFENDANT'S SUBMISSIONS

Counsel relied on the case of **Mukisa Biscuit Manufactures Company Limited vs West Distributors Ltd (1969) EA 696** on what constitutes a Preliminary Objection submitted that the Plaintiff does not have capacity to sue.

Counsel submitted that the Plaintiff has brought the suit as a son of the initial owner of the suit property who is deceased and that he does not obtained letters of administration and as such he lacks the capacity to institute these proceedings.

On the application for injunction counsel submitted that the Applicant has not established a prima facie case as the Applicant who alleges that to be the registered owner has altered a government record hence not entitled to an equitable remedy.

It was counsel's further submission that the Applicant has not met the threshold for grant of injunction hence should be dismissed

PLAINTIFF'S SUBMISSIONS

On the Preliminary Objection counsel that the matter cannot be disposed of by way of Preliminary Objection as evidence has to be tendered to determine the ownership of the suit land. Further that the Defendant has not raised a point of law to which can be determined in a Preliminary Objection and urged the court to dismiss it with costs.

On the application, counsel relied on the grounds on the face of the application together with the supporting affidavit Mwambaji Kailo Mtuto sworn on the 19th day of May, 2021 whereby the Applicant deponed that he is the registered and/or beneficial owner of the suit property Plot No. 354 Mikahani/ Mawema Bomu/ Chonyi adjudication Section.

The Applicant further deponed that adjudication was undertaken whilst he was living on the property whereby the adjudication committee affirmed his ownership rights over the property to be registered together with his cousin KONDE MWAVIVI KONDE as joint owners. It was the Applicants evidence that the Defendants have continuously interfered with the suit land with threats of eviction.

Counsel therefore urged the court to find that the Applicant has met the threshold for grant of injunctions.

ANALYSIS AND DETERMINATION

A Preliminary Objection can only be raised where the issue is a point of law and not where the court has to look elsewhere for facts to prove a case. The case of **Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696** discusses what a preliminary objection entails: -

In the case of Lemitei Ole Koros & another v Attorney General & 3 others (2016) eKLR stated as follows:

‘Where facts are not contested, the court is able to make a determination of law on the Preliminary Objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a Preliminary Objection. It would be improper for a court to make a contested determination of fact within a Preliminary Objection.’

Before a party raises an objection, he/she should be certain that whatever they are raising is a point of law and not side shows or shortcuts to terminate a case. If the issue is squarely a point of law, then the court would render its order on the same.

The Defendant raised an issue that the Plaintiff does not have locus standi to bring the suit as the suit land initially belonged to his father who is deceased. From the pleadings there is nowhere indicated that the suit land was registered in the name of the deceased. The pleadings are very clear that the adjudication was done when he was on the suit land and that the Adjudication Committee entered his name together with that of his cousin as joint owners.

I find that the Preliminary Objection lacks merit and is therefore dismissed with costs to the Plaintiff. I have further considered the application, the submission by counsel and find that it would be in the interest of justice to preserve the substratum of the case by granting an injunction restraining the Defendants as prayed plus costs of the application. The Plaintiff has established a prima facie case for grant of the order of injunction.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.