



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 34 OF 2018

RHODA S. KIILU PLAINTIFF

VERSUS

JIANGXI WATER & HYDROPOWER CONSTRUCTION

KENYA LIMITED..... DEFENDANT

RULING

1. Before me is a preliminary objection dated 10th November, 2020 raised by the defendant on the following grounds;

a. The Honorable Court lacks jurisdiction to hear and determine the *case for want of mandatory consent to file this case under section 8 of the Land Consolidation Act Cap 283 and section 30 of the Land Adjudication Cap 284, since the suit parcels of land are subject of adjudication section Kirindine-B.*

b. This suit as presented is incompetent and fatally defective for it offends the mandatory provisions of the statute law and therefore should not be allowed to proceed.

c. The plaintiff failed to exhaust the procedures allowed and or provided for under section 13 of the Land Adjudication Act and therefore the presence of this suit in court purports to invite the Honorable Court to make orders contrary to the express provisions of the law.

2. The matter was canvassed by way of written submissions. The defendant submitted that no suit shall be instituted without the consent of the land adjudication and settlement officer, and that the lack of such a consent is not a mere technicality but rather a legal issue. Thus the consent must be furnished at the time of filing the suit, hence nullity of the suit begins at inception of the proceedings, and cannot be cured by way of amendment or production of the required consent.

3. The defendants relied on the cases of; **William Mutuura Kairiba V Samuel Nkari & 2 others [2018]eKLR, Reuben Mwangera M'Itelekwa V Paul Kigea Nabea [2014]eKLR, Mugambi & another (suing as the legal representative of the estate of Peter Etharia M'Kailibi) & 4 others V Zachary Baariu & 6 others [2018]eKLR, Nicholas Tukey V Chepocheptatug Loyeruk & 2 others [2013]eKLR, Jackson Koome V M'Limongi M'Ikuamba & 2 thers [2018]eKLR**

4. The plaintiff submitted that the defendant's preliminary objection has no merit, the same is frivolous, vexatious and an abuse of the court process, that the mandatory consent to file this suit as raised by the defendant is not a pure point of law but it's a question of fact which has to be ascertained. Further, the plaintiff in her list of documents produced a letter dated 7/8/2018 from the Land Adjudication & Settlement Officer Igembe Central/North/South Sub-Counties stating that the adjudication section is under Cap 284 and the register was published as complete thus the allegation that the adjudication register has not become final is misleading and far-fetched.

5. She also submitted that her claim does not concern an interest in land or any dispute in the adjudication process as it is a claim for orders of injunction and damages for trespass and therefore urges the court to dismiss the preliminary objection with costs to her. She relied on the cases of; **Mwangi Stephen Muriithi V Daniel T. Arap Moi & another [2017]eKLR, Stanley Lezen Mliwa V Leonard Kapala Makangula & 2 others [2007]eKLR, Martha Kigen V Johana Tibino [2014]eKLR, Francis Mwiti Wanderi V Joseph Mbijiwe & another [2019]eKLR.**

6. As to whether a preliminary objection has merits, the threshold was set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696**, cited in **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, [2014] eKLR [paragraph 31]** as follows:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:

‘A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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.’”

7. Thus a preliminary objection is a matter of law which is capable of disposing the suit, it must not be blurred by factual details calling for evidence and it must not call upon the court to exercise discretion.

8. Both Section 30 of the Land Adjudication Act and Section 8 of the Land Consolidation Act require that a consent be obtained from the Land Adjudication Officer before the filing of a suit when the matter is in the ambit of the adjudication process. **Section 30 (1) of the Land Adjudication Act** stipulates as follows:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act”.

9. Section 8 of the Land Consolidation Act as more or less similar content.

10. What resonates from the adjudication statutes is that the consent is required in so far as the claim relates to an interest in land, where the process of ascertainment of the interests in land is not complete. In **Muthara Njuri Ncheke Council of Elders & another v Committee of NgareMara/Gambella Adjudication Section & 2 others [2019] eKLR**, I cited the case of **Republic vs Musanka Ole Runkes Tarakwa & 5 others exparte Joseph Lelol Lekitio & others (2015) eKLR**, where it was held that:

“A suit that questions the process of land adjudication, rather than the determination of interests would not be a suit concerning an interest in land and would therefore not require the consent of the land adjudication officer”.

Also see- ***Johnson Mbaabu Mburugu & another v Mathiu Nabea & 9 others [2020] eKLR, Francis Mwitwi Wanderi vs. Joseph Mbijiwe & Another (2019)eKLR.***

11. The suit parcels are situated in Kirindine “B” adjudication section. However in the matter before me, the plaintiff is seeking an order of permanent injunction against the defendant. She is not seeking a declaration that she is entitled to the suit land nor is she calling upon the court to determine or ascertain her interest in the suit land as envisaged under the adjudication statutes.

12. In the facts and circumstances of this case, it is clear that the issues for determination do not require the land adjudication officer’s consent.

13. Secondly, the defendant has not presented any proof that adjudication register is not complete. He who alleges must prove in line with the provisions of **Section 107 of the Evidence Act**. Thus the onus was upon the defendant to demonstrate that the adjudication process is still ongoing. It was therefore not enough for the defendant to claim that the suit is a nullity. To this end, I wholly adopt the holding of Munyao Sila J in **Martha Kigen v Johana Tibino [2014] eKLR** where he stated that;

“In my view, Section 30 is to be applied when the rights of the parties are still the subject of determination in the adjudication process. The reasoning behind Section 30 is so that the process of determining rights of people in an adjudication area is left to the mechanism set out in the Land Adjudication Act and not to the courts. It is the people on the ground who best know who is entitled to what area of land that is the subject of an adjudication process. The effect of Section 30 is to remove that determination from the jurisdiction of the court, so that the court does not determine any conflicts touching on interest over the land without the party aggrieved first seeking the permission of the Adjudication Officer. But where the Adjudication process has already determined the rights of the parties, I do not see any bar to a person filing a claim in court, alleging an interference in the property, without the need of consulting the Adjudication Officer.....”

In this case, the rights of the parties have already been determined by the Adjudication Officer. The case of the plaintiff, in my view, is not a case seeking a determination of rights of ownership over the suit land during an adjudication process; her case is that the adjudication process has already determined that they own the land, but that a third party, who has no proprietary interests, has interfered with their quiet possession, of what has already been demarcated to them, and has trespassed into their land. In my view, I do not think that there was a violation of Section 30 of the Land Adjudication Act in the circumstances of this case”.

14. Further I find that the letter dated 7.8.2018 authored by the land adjudication officer (to be found on page 17 of plaintiff’s bundle of documents) shows that the adjudication register is complete.

15. The foregoing analysis leads to a finding that the Preliminary Objection is without basis and the same is dismissed with costs to the

plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

J. Muthomi for plaintiff

Nyongesa for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE