



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 33 OF 2018

(Formerly Machakos ELC Case No. 299 of 2011)

BETH WAMBUI MWAURA.....1ST PLAINTIFF

ALBERT P. MWAURA KIERO.....2ND PLAINTIFF

WILFRED K. NJENGA.....3RD PLAINTIFF

VERSUS

IBRAHIM LEI ELE SONDAI (alias ELE SUNDAI).....1ST DEFENDANT

JOSIPHINE SEKELON KILUSU.....2ND DEFENDANT

NATIONAL LANDS COMMISSION.....3RD DEFENDANT

REGISTRAR OF TITLES, KAJIADO REGISTRY.....4TH DEFENDANT

JOSEPH MWANIKI GITAU.....5TH DEFENDANT

RULING

What is before me for determination is the 1st and 2nd Defendants' Notice of Preliminary Objection dated the 5th December, 2018 on the following grounds:

1. Lack of a written agreement for the 10 acres of the Land known as Plot No. 159 violates section 3(3) of the Law of Contract.
2. That the verifying affidavit of the 1st Plaintiff is a false affidavit rendering the entire suit a nullity.
3. That the suit violates section 4 Rule 1 of the Civil Procedure Rules.
4. Existence of the Judicial Review No. 4 of 2009 in Machakos renders this suit incompetent and an abuse of the court process.
5. That the suit should be dismissed with costs based on the above grounds.

The Plaintiffs, 1st, 2nd and 5th Defendants filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Notice of Preliminary Objection dated the 5th December, 2018 including the Plaintiffs, 1st, 2nd and 5th Defendants' submissions, the only issue for consideration is whether the suit should be dismissed on the grounds cited above.

The 1st and 2nd Defendants submitted that there was no valid agreement for sale of land and no consent of the Land Control Board was ever sought for within six (6) months of the date of the alleged agreement. They further submitted that the suit is statute barred and the same

should be struck out for failing to adhere to the provisions of Order 4 Rule 1 of the Civil Procedure Rules. They relied on the cases of **Charles Mwirigi Miriti V Thananga Tea Growers Sacco Ltd & Another (2014) eKLR; Hiran Ngaithe Githire V Wanjiku Munge (1979) KLR 50; Willy Kimutai Kitilit V Michael Kibet (2018) eKLR; Kariuki V Kariuki (1983) KLR 222; Iga V Makerere University (1972) EA 65 and Mwangi Stephen Muriithi V Daniel T. Arap moi & Another (2017) eKLR** to buttress their arguments. The Plaintiffs opposed the Preliminary Objection and submitted that there exists an agreement dated the 14th September, 1988 for the 10 acres of the land known as Plot No. 159. They contended that the suit did not violate the provisions of Order 4 Rule 1 as claimed by the 1st and 2nd Defendants as the Plaintiff meets threshold for particulars of the Plaintiff. They reiterated that the Preliminary Objection relates to matters of fact. They relied on the cases of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014 and Hassan Nyanje Charo V Khatib Mwashetani & 3 others, Civil Application No. 23 of 2014 and in Aviation & Allied Workers Union Kenya V Kenya Airways Ltd & 3 Others** to support their opposition to the Preliminary Objection.

In the instant Preliminary Objection, I note the 1st and 2nd Defendants are claiming there is no written Agreement for the transaction in respect of Plot 159 yet in the Plaintiffs' List of documents which is part of the Court Record, there is an Agreement dated 14th September, 1988 between the 1st Defendant and the 2nd Plaintiff to that effect. On the issue that the verifying affidavit of the 1st Plaintiff is a false affidavit rendering the entire suit a nullity and that the suit violates order 4 Rule 1 of the Civil Procedure Rules. I have perused the Plaintiff and note that it indeed adheres to the provisions of Order 4 Rule 1 of the Civil Procedure Rules as particulars are contained therein. It is my considered view that objection in respect of the 1st Plaintiff's verifying affidavit is a matter of procedural technicality.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held that **'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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'**

Further in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: **'A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'**

In relying on these two decisions and based on my analysis above, I note the Notice of Preliminary Objection, has raised mostly matters of fact which have to be ascertained. I opine that as a Court, which is an independent arbiter, it is pertinent for it to administer substantive justice and not rely on procedural technicalities to defeat it.

Further, I find that in the current Constitutional dispensation and depending on Article 159 (2) (d) of the Constitution, I hold that the style of seeking dismissal of a suit on procedural technicalities is a defeated avenue. This position is affirmed in the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** where Justice Ochieng held that **.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.'**

On the issue of existence of the Judicial Review No. 4 of 2009 in Machakos rendering this suit incompetent and an abuse of the court process. The Plaintiff has confirmed that the judicial review application was withdrawn on 12th May, 2015 vide a Notice of Withdrawal dated the 8th May, 2015. I hence do not find this averment tenable.

In the circumstance, I find the Notice of Preliminary objection dated the 5th December, 2018 unmerited and will disallow it.

Costs will be in the cause

Dated signed and delivered in open court at Kajiado this 5th day of November, 2019

CHRISTINE OCHIENG

JUDGE