



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIROMENT LAND CASE NO. 143 OF 2012

DAVID MATHI THURANIRA.....1ST PLAINTIFF

JOSEPH MIRITIL.....2ND PLAINTIFF

ANDREW GITONGA JOHANA.....3RD PLAINTIFF

MARY KARIMI JOHANA.....4TH PLAINTIFF

VERSUS

JOSEPH KALUMA LIMBERE.....1ST DEFENDANT

PHARIS KAIMENYI.....2ND DEFENDANT

RULING

1. The plaintiffs filed this suit against the defendants on 24th October 2012, seeking inter alia a declaration that the suit land measuring 20 acres or thereabouts at Maili Tatu, Rei Sub-location is the property of the plaintiffs and/or their family.
2. Before the suit could be heard on its merits or otherwise, the 2nd defendant Pharis Kaimenyi filed a Notice of Preliminary Objection on 28nd May 2014, contending inter alia that the Plaintiff lacked locus standi to bring the instant suit against her and that the plaintiffs suit was bad in law, an abuse of the process of court, embarrassing and fatally defective. The court subsequently directed that the Preliminary Objection be canvassed by way of written submissions.
3. Briefly, it was submitted for the 2nd defendant that the plaintiffs lacked the locus standi to bring the instant suit against the 2nd defendant as they had never processed or obtained any Grant of Representation prior to filing of the suit over their late father's land and that indeed no Limited Grant or at all had been filed to date prior to institution of the suit. The 2nd defendant contended thus that the plaintiffs had no locus to institute the present suit over their late father's land and accordingly urged the court to strike out this suit with costs to the 2nd defendant.
4. On the other hand, the plaintiffs in opposition to the said Notice of Preliminary objection sought to rely on the *locus classicus* case of **Mukisa Biscuit Manufacturing Company Limited** and submitted that there was nothing in the pleadings that supported the defendant's Preliminary Objection and that the same should await the hearing of the case. Consequently, they urged the court to dismiss the Preliminary Objection with costs.
5. I have carefully considered the preliminary objection and the rival submissions by the parties. The law on Preliminary Objections is now well settled. It is now established that the proper practice is to determine the preliminary objections first especially where such preliminary objections are likely to dispose of the suit or application entirely. The case of ***Mukisa Biscuits Manufacturing Co. Ltd vs West end Distributors Ltd (1969) EA 696*** is instructive in this regard as per Law JA that:

“A preliminary objection consists of a point of law which has been pleaded or by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Sir Charles Newbold in the same case held that :

“A preliminary objection is in the nature of what used to be 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.”

6. J.B Ojwang J. as he then was succinctly put it thus in the case of *Oraro vs Mbaja (2005) eKLR:*

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to Investigate facts; a matter cannot be raised as a preliminary point.

6. In the instant case the plaintiffs have contended that the suit land is family land which is communally owned. The 2nd defendant on the other hand contended that the suit property belonged to the plaintiffs’ deceased father. It is therefore apparent that the issues which the 2nd defendant is raising are not pure points of law as envisaged by the *Mukisa Case* supra as the same invite arguments and would have to be proved through evidence. This can only be done if the matter proceeds to full trial.

7. Taking into totality all the circumstances in this case, I find that the Notice of Preliminary Objection raised by the 2nd defendant is not meritorious and **I accordingly dismiss the same with costs to the plaintiffs.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 3RD OCTOBER, 2018 IN THE PRESENCE OF:-

C/A: Galgalo/Faith

Rimita for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE