



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 12 OF 2021

GICHOHI MWANGI.....1ST PLAINTIFF
TERESIA WANJIKU MBURU.....2ND PLAINTIFF
EUNICE WANJIKU MUGO.....3RD PLAINTIFF
EUNICE WANJA GITHINJI.....4TH PLAINTIFF
ALICE WAMBUI MUTUA.....5TH PLAINTIFF
NANCY NJERI NDUNGU.....6TH PLAINTIFF
HANNAH RUGURU MWANGI.....7TH PLAINTIFF
BENSON IRUNGU MWANGI.....8TH PLAINTIFF
PAUL NGUNJIRI WAIRIMU.....9TH PLAINTIFF
ESTHER WANJIKU P MWANGI.....10TH PLAINTIFF
LUCIA THERERO NDIRANGU.....11TH PLAINTIFF

VERSUS

JEREMY NDUNGU MBUTHIA t/a J N MBUTHIA & CO ADVOCATES.....DEFENDANT

RULING

1. This ruling is in respect to a Preliminary Objection filed on the 11/5/2021 that;

a. The Notice of Motion dated the 30/4/2021 and the entire suit is incompetent and bad in law in view of the mandatory requirement in Order 37 Rule 8 of the CPR that requires that proceedings in respect to restrictions be by way of Originating Summons with notice to the Land Registrar as per Section 78(1) and (2) of the Land Registration Act.

b. The costs in this matter are subject to an agreement dated the 24/8/2020 which the 1st Plaintiff has annexed to his supporting affidavit as annexure GM9 which agreement is binding on the parties. No Order has been obtained invalidating the same. This suit therefore contravenes the express provisions of Section 45(2) as read with Sections 45(1) of the Advocates Act as no suit can be valid for the recovery of the costs while the agreement remains in place.

2. The Defendant sought for orders that the suit be struck out.

3. The genesis of this suit is that the Plaintiffs filed their suit against the Defendant on the 4/5/2021 seeking inter alia the removal of the restriction placed by the Defendant on land Parcel Maragua Ridge/104 (suit land belonging to the Plaintiffs; an order compelling the Defendant to pay them the sum of Kshs.332,500/- being the costs of the suit in ELC 72 of 2018; general damages and costs of the suit.

4. The gist of the Plaintiffs case is that they have fully settled the legal fees in favour of the Defendant for successfully representing them in Murang'a ELC No. 72 of 2018 and the action of lodging a restriction on the suit land is unlawful.
5. They faulted the Defendant for demanding Kshs 903,667/50 despite the agreed instruction sum of Kshs 80,000/- at the commencement of the suit, out of which a deposit of Kshs 32,500/- was paid. They accused the Defendant of duping the 1st Plaintiff into executing an agreement for fees in the sum of Kshs 903,667/50 which they insist was not owing at all. That at the conclusion of the case the Defendant was paid a sum of Kshs 300,000/- being legal fees on the 23/12/2020, bringing the total amount to Kshs 332,500/-, which amount they now demand as a refund. They fault the Defendant for failing to pursue costs payable to them in ELC No. 72 of 2018 or executing against the Plaintiffs in the said suit. They denied owing the Defendant Kshs 603,667/-
6. Simultaneously with filing the suit, the Plaintiffs filed a notice of motion seeking interalia orders restraining the Defendant from interfering and trespassing on the suit land.
7. In his defence the Defendant admits lodging the restriction on the suit land to protect his claim for legal fees in the sum of Kshs 603,667. That the deposit was paid pending the determination of the full fees at the conclusion of the suit. That advocate – client costs were taxed at Kshs 602,445/- on the 10/8/2020 by the Court which amount is due and owing from the Plaintiffs.
8. On the 12/5/2021 the Defendant filed a Preliminary objection on the grounds set out in para 1 above.
9. On the 19/5/2021 directions were taken whereupon the parties elected to canvass the Preliminary objection by way of written submissions. I have read and considered the written submissions of the Defendant. The Plaintiff failed to file despite express directions from the Court.
10. On the first limb, the Defendant contends that the suit is incompetent on two fronts; it ought to have been filed under Originating Summons and secondly it was filed without notice upon the Land Registrar as required under Order 37 Rule 8 and Section 78(2) of the Land Registration Act.
11. Secondly the Defendant argued that the Court's jurisdiction has not been properly invoked in view of Section 45(2) of the Advocates Act which provides that where there is an agreement for costs, a suit for recovery of costs is a nullity unless the agreement has been challenged. That no claim for general damages would lie in favour of the Plaintiffs.
12. The key question is whether the objection is a pure point of law.
13. The test in determining a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Company Ltd –Vs– West End Distributors Ltd [1969] EA 696** where the Court held that:

“ 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.
14. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.
15. The first focus of the objection is the provisions of Order 37 rule 8 of CPR and Section 78 (1) and (2) of the Land Registration Act.
16. Order 37 rule 8 of the Civil Procedure Rules provides as follows;

“an application under the Land Registration Act (LRA) , 2012 other than under Part VII (restraints on disposition) and Part VIII (rectification and indemnity) thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in that suit” [emphasis is mine].
17. The Defendant has argued that the suit is fatal because it ought to have been instituted by way of Originating summons. To the contrary, the provisions of Order 37 Rule 8 of the Civil Procedure Rules expressly prohibits this Court not to entertain a claim for restraints on disposition and rectification and indemnity of a title registered under the Land Registration Act by way of Originating Summons.
18. The reason is explained in Section 76 and 78 of the LRA which call for evidence to be heard and notices to be issued by the Land Registrar before restricting land.
19. According to Section 78 of the LRA the Land Registrar must issue notice, direct inquiries to be made and conduct a hearing before making an order for restriction or a prohibiting order on the land. Similarly, Section 78 of the LRA provides that upon an application, the Registrar gives notice to the proprietor or any person to be affected by the restriction of the removal of the same. It follows that both processes emphasise on proper notices being given to the land owner and any other persons to be affected by the order of prohibition.
20. The simple explanation for these provisions of the law is that a title can only be cancelled by the Court after evidence has been tendered to show that the same was procured fraudulently, or by mistake. To prove fraud, one has to examine in detail the documents that led to the acquisition of the said title, examination and cross-examination of the people involved in the processing of the title and sometimes the calling of expert witnesses or the officials from the Ministry of Lands and other relevant institutions. It therefore follows that cancellation of a title deed or a Certificate of Lease is not a simple issue which can be decided by way of an originating summons hence the provisions of Order 37 Rule 8.

21. Similarly, restraints on disposition on land are not to be done lightly as they impede the right to the enjoyment of land by a proprietor and that explains why the law requires the Land Registrar to issue notices, make the necessary inquiries and conduct a hearing and only then that he can make an appropriate order to restrict dealings on the land.

22. Courts have held time without number that the scope of inquiry under originating summons is limited and is not the appropriate method when dealing with contested matters. Originating summons can best be used when dealing with straightforward and simple claims intended to be resolved by affidavit evidence.

23. According to the copy of title and the official search dated the 9/4/2020, the Plaintiffs are the registered proprietors of the suit land. Entry No 5 is a restriction restricting no dealings on the suit land pending a resolution of a matter between the proprietors and the Defendant. It is not demonstrated to the Court whether the Registrar complied with the provisions of Section 76 of LRA in registering this restriction. I have perused a letter dated the 28/1/2021 by the Land Registrar addressed to the Plaintiffs informing them of a restriction lodged on the title by the Defendant. It is not clear under what provisions of the law was the letter written and whether the procedure set out in Section 76 of LRA was followed. It appears that the letter is coming after the fact, which is the registration of the restriction.

24. The second focus of the objection was Section 45(2) of the Advocates Act that requires that a party must first challenge an agreement for costs before filing a suit on the same. That the Plaintiffs and the Defendants have an agreement in place and bringing the suit on costs is fatal to their case. In determining this objection, the Court would have to investigate whether there is a registrable interest created from the cause of action complained of; whether the Defendant can enforce recovery of fees except by enforcement of a valid judgement against the Plaintiffs. Other areas that may require investigation by the Court is whether any actions have been taken to recover party and party costs taxed by the Court from the Plaintiffs in ELC No. 72 of 2018. Further at what stage will the Plaintiffs herein be liable to pay party and party costs.

25. From the forgoing it is my view that justice will be served if the suit is allowed to be heard on its merits. The likely scope of inquiries on the issues enumerated above removes the objection from being a pure point of law. The objection is clouded by facts which ousts it from being a pure point of law.

26. In the end the Preliminary objection is not merited and it is dismissed with costs to the Plaintiffs.

27. It is so ordered.

DATED, SIGNED & DELIVERED AT MURANGA THIS 29TH DAY OF JULY 2021.

J G KEMEI

JUDGE

Delivered online

Gicheru HB for Mbuthia for Plaintiff/Respondent

1st – 11th Defendants/Applicants - Absent

Kuiyaki/Alex, Court Assistants