



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO.84 OF 2018

JULIUS MUTHUNGU MUKANDA.....PLAINTIFF

VERSUS

MBULUNG'A KITUMA.....DEFENDANT

RULING

1. On the 29th October, 2018, the Defendant filed a notice of preliminary objection dated the 26th October, 2018 whereby he has raised the following grounds: -

- 1) That the proceedings herein as filed are fatally defective on the ground that the Defendant herein has been sued in his personal capacity and not as a legal representative of the estate of Kituma Ngata Musau.**
- 2) That the Makueni District Land Dispute Tribunal lacked capacity to hear any dispute relating to any registered land.**
- 3) There is absolutely no cause of action established in view of the aforesaid.**

2. The Court directed that the notice of preliminary objection be disposed off by way of written submissions.

3. The Defendant's Counsel submitted that all that land known as Ukia/Utaati/449 is registered in the name of Kituma Nganda Musau who is the father of the Defendant herein. The Counsel went on to submit that Kituma Nganda Musau passed away sometime in 1997 and the land was never transferred to either the Defendant nor the Plaintiff. That as such, the land still forms part of the estate of the late Kituma Nganda Musau. The Counsel went on to submit that the Plaintiff should therefore have sued the legal representative of the estate of Kituma Nganda Musau and shown proof that the person is the legal representative as per the provisions of the Law of Succession Act Cap 60 of the Laws of Kenya.

4. Regarding what constitutes a preliminary objection, the Counsel cited the case of **Football Kenya Federation vs. Kenya Premier League Ltd and 4 others [2015] eKLR** which adopted with approval the definition enunciated in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** where law JA stated thus: -

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

Sir Charles Newbold P. on the other hand 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.”

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 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 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.”

5. The Counsel further cited the case of *Mary Nanjala Muhalya vs. Ambrose Kipruto [2014] eKLR* where the Court had this to say regarding the issue of who is a personal representative: -

“A legal representative as defined in the Civil Procedure Act is equivalent to the definition of a personal representative as defined under the Succession Act Cap 160 Laws of Kenya. Section 3 of the Law of Succession Act defines “Personal representative” as “the executor or administrator as the case may be of a deceased person.” Administrator in the same section is defined as “a person to whom a grant of letters of administration has been made under this Act.” It is therefore clear that a legal representative is a person to whom a grant of letters of administration has been made under the Succession Act...”

6. Arising from the above the Counsel submitted that the Defendant has been sued in his personal capacity and not as legal representative of the estate of the late Kituma Nganda Musau. That the suitland Ukia/Utaati/449 is registered in the name of the deceased and it forms part of the deceased's estate. That any person therefore who is sued with regards to the ownership of the said land ought to be a legal representative of the estate. That the orders sought in this suit are specifically sought against the Defendant and not the beneficiaries of the estate of the late Kituma Nganda Musau and since the Plaintiff has not presented any proof that the Defendant is the legal representative of the said estate, the suit herein is fatally defective and must be struck out.

7. On the other hand, the Plaintiff's Counsel submitted that the Defendant has been sued in his personal and his representative capacities for occupying, farming, residing in, grazing his livestock and/or having his family on the land contrary to the Plaintiff's rights and interests thereon and also for hinging his offensive actions of use and occupation of the land on his heritage and parentage and thus for the legal equitable relief of declaration and injunction, he is suited in the matter.

8. Having read the notice of preliminary objection and the rival submissions filed by the Counsel for the parties herein, my finding is that the plaint herein clearly shows that the Defendant has been sued in his personal capacity. The orders sought as against the Defendant and more so the order of cancellation of the land title deed number Ukia/Utaati/449 in the name of Kituma Nganda Musau and the rectification of the land register and registration of the land title deed in the name of Julius Muthungu Mukanda, the Plaintiff herein with the Court's Deputy Registrar executing all the transfer documents cannot be issued against the said Defendant. To that extent, therefore, I am in agreement with the Defendant's Counsel that the suit as against the Defendant is factually defective. Suffice it to say the notice of preliminary objection is meritorious and in the circumstances, I hereby proceed to strike the Plaintiff's suit with costs to the Defendant.

Signed, dated and delivered at Makueni this 28th day of January, 2020.

MBOGO C.G.,

JUDGE.

In the presence of: -

Mr. Nthiwa holding brief for Mr. Mwanja for the Defendant

Mr. Mulei holding for Mr. Odawa for the Plaintiff

Ms. C. Nzioka – Court Assistant

MBOGO C.G, JUDGE,

28/01/2020.