



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 227 OF 2014

PETER MORACHA OENDO.....PLAINTIFF

VERSUS

NYAMACHE MAGETO

AGNES NYANGWESO MASONGO

MAGETO MASAHA

MASAHA MAGETO

JOSH ORINA MAGETO

RONALD MACHOGE NGOGE

ALFRED MACHOGU MAGETO

JUSTUS MAGETO MONGERI

SAMSON ORIORO JONATHAN

COUNTY LAND REGISTRAR, KISII COUNTY

THE HON. ATTORNEY GENERAL.....DEFENDANTS

RULING

INTRODUCTION

1. This ruling is in respect of the Defendants' preliminary objection dated 26th March 2019 in which they raised the following issues:

- i) That the Plaintiff did not take out proceedings for confirmation of the Limited Grant issued in Kisii HCC Succession Cause No. 70 of 2009 prior to transmission of the title to him.
- ii) The Limited Grant issued to the Plaintiff in the Succession Cause could not in law be relied on to transmit title over L.R No NYARIBARI/CHACHE/B/B/BOBURIA/328 (hereinafter referred to as the suit premises) to the Plaintiff.
- iii) There being no confirmed Grant, the Plaintiff could only have relied on the Limited Grant of Letters of Administration issued in the Succession Cause to cause the transmission of the suit premises to himself, an illegality by all accounts.
- iv). The title held by the Plaintiff over the suit premises is illegal and/or a nullity on account of which the same cannot be relied on to mount the suit before court
- v) The Limited Grant issued in the Succession cause on 8th July 2019 was revoked and the Succession cause marked as closed on the said date
- vi). In the premises the suit before court is misconceived and cannot lie.

2. In support of the Preliminary objection the Defendants placed reliance on the following documents:

- a) The Petition filed in Kisii HC Succession Cause No. 70 of 2009
- b) A copy of the Kenya Gazette No. 4332 of 24.4.2009
- c) Grant of Letters of Administration issued on 3rd June 2009.
- d) Court order of 8th July 2015
- e) Certificate of official search dated 23rd November 2010.

The Preliminary objection was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUE FOR DETERMINATION

3. The singular issue for determination is whether the Preliminary objection ought to be upheld.

ANALYSIS AND DETERMINATION

4. The starting point is to define what a preliminary objection is so as to isolate the wheat from the chaff.

The case of **Mukisa Biscuits V West End Distributors Limited (1969) E.A 696** defined a Preliminary Objection as follows:

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

Justice Newbold in the said suit argues 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 had to be ascertained or if what is sought is the exercise of judicial discretion”

In **George Oraro v Barack Eston Mbaja Nairobi HCCC No. 85 of 1992** J.B Ojwang (as he then was) held as follows:

“A Preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through evidence”.

He further observed that:

“...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”

5. Had the Defendants raised grounds that do not require any facts to be ascertained, nor those requiring the exercise of Judicial decision, the said grounds would have qualified as a Preliminary Objection. In order to determine grounds (ii) and (v), the court would need to examine the facts. The defendants went as far as making reference to their list of documents. This disqualifies their Preliminary Objection as it is not based on pure points of Law..

6. The defendants argue that the plaintiff’s suit is misconceived as it is based on a Limited Grant issued in Kisii HC Succession Cause No. 70 of 2009 which was revoked and the file marked as closed. In order to verify the defendants’ allegations, the court would have to examine the succession records which amounts to analyzing the evidence in order to determine whether or not the grounds raised are true.

7. In the circumstances, I am not persuaded that the issues raised by the defendants are pure points of law. The Preliminary Objection is therefore dismissed with costs to the Plaintiff.

Dated, signed and delivered at Kisii this 5th day of November 2019.

J.M ONYANGO

JUDGE