



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 154 OF 2018

GIDEON OIBOO PELLO.....1ST PLAINTIFF

JOSEPH TURERE PELLO.....2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Preliminary Objection dated the 1st July, 2019 where it seeks the entire suit to be struck out on the following grounds:

1. This Honourable Court does not have jurisdiction to entertain this suit by dint of mandatory provisions of section 18 (2) of the Land Registration Act, 2012 to determine this matter and the Plaintiff's remedy lies in section 19 of the Land Registration Act, 2012.
2. The Plaintiffs lacks locus standi to institute proceedings on behalf of the Estate of Lankoi Ole Pello Saisai (Deceased).
3. By dint of Order 2 Rule 15 of the Civil Procedure Rules, 2010, the Plaint is defective as it does not disclose a reasonable cause of action against the Defendant.
4. By dint of the above, the entire suit herein is premature, incompetent, misconceived and a complete nullity and should therefore be struck out with cost.

Both the Plaintiffs and the Defendant filed their respective submissions to canvass the said Notice of Preliminary Objection.

Analysis and Determination

Upon consideration of the instant Notice of Preliminary Objection including the respective parties' submissions the only issue for determination is whether this suit should be struck out with costs.

It is the Defendant's contention that the Plaintiffs do not have locus to institute this suit to represent the estate of the late Lankoi Ole Pello who was owner of suit land. The Plaintiffs submit that they have locus standi as they obtained letters of administration ad litem which they have filed herein as part of their documents. From a perusal of the Plaint, I note the Plaintiffs at paragraph (3) therein have indicated that they are administrators of the estate of Lankoi Ole Pello Saisai who was the owner of land parcel number Kajiado/ Dalalekutuk/ 30. They have also filed a Copy of the Grant of Letters of Administration Intestate (Ad Litem) dated the 8th November, 2016 which confirms that they are indeed Administrators to the said estate. The Defendant contends that failure by the Plaintiff to indicate in the face of the Pleadings that they are representatives renders it a nullity. The Defendant further submitted that the Court that issued the Grant of Letters of Administration Intestate did not have pecuniary jurisdiction to do so.

Black's law dictionary defines locus standi as the right to bring an action or to be heard in a given forum. I note that the said forum also includes a Court of law.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, defined a Preliminary Objection as follows;

“.....a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a 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, 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. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

I note the Defendant is disputing the Grant issued by a Court of Competent jurisdiction in this forum but this Court is not clothed with jurisdiction to revoke the said Grant. On the failure by the Plaintiffs to indicate that they are legal representatives of the deceased estate on the title of the suit but pleaded the same in the Plaint, I hold that the same is not fatal as this is an issue of form. I opine that the pleadings can be amended to reflect this position. Further article 159 (2) (d) of the Constitution stipulates that ' 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.

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. '**

Based on the facts as presented and in relying on article 159 (2) (d) of the Constitution as well as associating myself with the decisions cited above, I will decline to strike out the suit on this ground.

On whether the suit offends the provisions of section 18(2) of the Land Registration Act. I note the Plaintiffs pleaded that the Defendant proceeded to the suit land, cut down trees and hived off 12 hectares. The Defendant contends that this is a boundary dispute which ought to be dealt with by the Land Registrar first. I beg to differ with the Defendant herein as the Plaint clearly indicates the Defendant trespassed thereon and hived off 12 hectares. I opine that the issue being raised herein can best be determined once the suit is set down for hearing on its merits and not at this juncture.

On the issue that this suit does not raise a reasonable cause of action against the Defendant. I note the Plaintiffs at paragraph 4 of the Plaint pleaded that on 12th September, 2018, the Defendant trespassed on the suit land, pulled down trees and hived off 12 hectares thereon. To my mind these are triable issues which the court cannot determine at this preliminary stage. The Defendant in his submissions claim the land in dispute concerns the location of the Kajiado Mashuru Road which is currently being constructed but did not plead so in the Defence. In the Court of Appeal decision of **RAMJI MEGJI GUDKA LTD -Vs- ALFRED MORFAT OMUNDI MICHIRA ;& 2 OTHERS [2005]** eKLR held as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”

In relying on the above cited Court of Appeal decision as well as the overriding objective of this Court as governed by Section 3 of the Environment and Land Court Act which directs courts to *facilitate the just, expeditious, proportionate and accessible resolution of disputes*, I find that it would be pertinent if the suit was set down for hearing on its merits to enable the court make a final determination of the dispute at hand.

It is against the foregoing that I find the instant Notice of Preliminary Objection premature and will disallow it. Costs will be in the cause.

Dated signed and delivered via email this 11th day of May, 2020

CHRISTINE OCHIENG

JUDGE