



REPUBLIC OF KENYA

INTHE HIGH COURT OF KENYA AT MERU

E & L NO.50 OF 2013

REUBEN MWONGERA M'ITELEKWA.....PLAINTIFF

VERSUS

PAUL KIGEA NABEA.....DEFENDANT

RULING

This ruling concerns a Notice of Preliminary Objection filed by the defendant and dated 10th May, 2013. It has the following grounds:

1. The suit glaringly flies in the face of Section 8 of the Land Consolidation Act, Cap.283 and Section 30 of the Land Adjudication Act, Cap 284, Laws of Kenya, as held in **MERU HCCA No.89 of 2006: MICHAEL MURIUKI MURINDI VS. LAWRENCE NGIGOYA GICHERU**
2. The plaintiff has no locus standi to sue on behalf of the estate of his late father, as held in **MERU HC SUCC NO. 431 OF 2008: CHARLES MBURUGU M'IRAMBU vs ISABELA KAIRUTHI KATHURIMA**
3. The entire case is legally flawed, fatally defective and incurably defective, irredeemably and ab initio.
4. The suit is plainly frivolous, vexatious, scandalous and an epitome of abuse of the due process of the Court, under Order 2 Rule 15 (1) (b) and (d) of the Civil Procedure Rules 2010.

The objection was canvassed by way of written submissions.

Ground 1 of the objection argues that the consent of the Land Adjudication Officer is a prerequisite to the filing of a suit over land situate in an adjudication area or section. The objection argues that the suit land Parcel No. 372 falls under Antuamburi Adjudication Section. The objection vehemently argues that the plaintiff did not obtain the requisite consent as required.

Ground 2 argues that the plaintiff has no capacity to file this suit on behalf of the estate of his late father **M'ITELEKWA MUCHEKE**. The defendant points out that at paragraph 3 of his plaint, the plaintiff avers that he is the son of **M'ITELEKWA MUCHEKE** while the limited grant refers to **M'ITELEKWA M'MUCHEKE NAITURI**.

Ground 3 of the objection says that due to the foregoing salient legal points the plaintiff's entire suit is legally flawed, incurable, defective and irredeemable ab initio. The defendant argues that the suit cannot be sustained or remedied even through amendments and prays that it be struck out with costs to the defendant.

On ground 4 of the preliminary objection the defendant argues that the parcels of land in issue were distinct and in separate locations and for that reason, the plaintiff raises no reasonable cause of action against the defendant.

The plaintiff opposed the preliminary objection. On ground 1 the plaintiff submitted that there existed a consent allowing the plaintiff to file this suit. He felt that the defendant had tried to besmirch the consent by saying that the suit was filed beyond the 60 days written in the consent. He argued that neither Section 8 of the Land Consolidation Act nor Section 3 of the Land Adjudication Act had any provision allowing the Land Adjudication Officer to impose a time limit. He argued that, in any event, the Court should apply the provisions of Article 159 (2) (d) of the Constitution and ignore procedural technicalities in favour of substantive justice. On ground 2 the plaintiff stated that M'ITELWEKWA MUCHEKE and M'ITELEKWA MUCHEKE NAITURI are the names of the same person. It was suggested for the plaintiff that the defendant should say whether he knew of another M'ITELEKWA M' MUCHEKE who died on the same date indicated in the grant. The plaintiff opined that this ground raised factual questions and was evidentially in nature and therefore did not raise a pure point of law.

On ground 3, the plaintiff argued that the plaintiff had not shown any ground to warrant the Court to sustain it. He said that his arguments showed that the suit was not flawed or defective.

On ground 4, the plaintiff submitted that it was baseless and lacked merit. He said that it was trite law that preliminary objections should be predicated upon pure points of law. As the defendant had introduced the scene visit by this Court's deputy registrar, he had brought in disputed facts which could not be used as a basis for dismissing the suit.

I have carefully considered the grounds of objection raised in this objection. I have also considered the submissions of the parties and the authorities proffered.

I find that ground 2 raises matters involving disputed facts and more so whether M'Itelekwa Muccheke and M'Itelekwa Muccheke Naituri are one and the same person and if the limited grant issued to the plaintiff gave him capacity to institute this suit. The ground does not raise a pure point of law. Ground 3 is too general and does not demonstrate the pure point of law the defendant sought to bring out. Ground 4 veritably raises issues which would need to be canvassed at the hearing of the main suit.

I now turn to ground 1 of the objection.

Section 8(1) of the Land Consolidation Act, Cap 283 states:

“Subject to the provisions of this section no person shall institute and no court whatever shall take cognizance of or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication officer to the institution or continuance of such proceedings has been given”

Section 30 (1) of the Land Adjudication Act states:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication section has become final in all respects under Section 29 (3) of this Act.”

The plaintiff in this suit prays for judgment against the defendant for:

(a) An order for reinstatement of land parcel NO. 372 measuring 0.70 acres Antuamburi Land Adjudication Section as per the original Adjudication record to be at Mikinduri Market near the bus stage.

(b) An order for permanent injunction to restrain the defendants (sic) his heirs, agents, Kins and /or anyone working in the defendants' behest from interfering in whichever manner with the location of land parcel No. 372 Antuamburi Land Land Adjudication Section.

(c) Costs and interest of this suit.

There is no argument regarding the fact that the adjudication register for the Adjudication section where the suit land is situate had not become final in all respects under section 29(3) of the Land Adjudication Act at the time when this suit was filed.

An examination of the Court records reveals that a consent from the Land Adjudication officer was not annexed to the suit documents when this suit was filed. The plaintiff has annexed to his further supporting affidavit a consent from the District Land Adjudication Officer dated 27th June, 2011. The said consent concerns Parcel Nos. 4419, 6127, 4946 and 6323. Parcel No. 372 is not mentioned. The requirement for consent to be granted by the Land Adjudication officer before a suit can be granted is a statutory requirement. It can not be considered a procedural technicality. It is not a mere technicality. It is a legal issue. In accordance with Section 30 of the Land Adjudication Act this Court and any other Court should not entertain any suit filed except with the consent of the Adjudication Officer until the register for that adjudication Section has become final.

Section 8 (1) of the Land Consolidation Act directs that no cognizance should be taken of any suit appertaining to an adjudication area unless there was prior consent in writing of the Adjudication Officer. Section 8(2) requires officers of all courts to be satisfied that the apposite consent has been granted by the Land Adjudication Officer before issuing any plaint or other legal process for the institution or continuance of any proceedings prohibited by Section 8(1).

The prayers in the plaint relate to parcel No. 372 Antuambari Land Adjudication Section. I am satisfied that the consent of the Land Adjudication Officer had not been obtained before this suit was filed. In the circumstances, I uphold Ground 1 of the Preliminary Objection. This suit is struck out. I award costs to the defendant.

It is so ordered.

Delivered in open court at Meru this 6th day of June, 2014 in the presence of:

Cc Daniel Lilian

Kimathi Kiara h/b Mwanzia for plaintiff's

Mwirigi h/b Carlpeters Mbaabu for Defendant.

P.M. NJOROGE

JUDGE