



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO 572 OF 2009

DAVID KINUTHIA KARANGI

SAMUEL KINYATI.....PLAINTIFFS

VERSUS

TERESIA WANJIRU MUIGAI, PAUL MANGURU MUIGAI

[Sued as the Administrators of the Estate of MUIGAI CHEGE..DEFENDANTS

AND

LUCY MUTHONI1ST INTERESTED PARTY

SOPHIA NYOKABI.....2ND INTERESTED PARTY

RULING

The application for this courts consideration is the preliminary objection raised by the 2nd defendant on the grounds that the Originating Summons does not comply with the Civil Procedure Rules under which it purports to have been brought. They added that even of the Originating Summons complied with the Rules or could otherwise be cured which is denied it is incurably defective as it is brought against the defendants as administrators whereas the subject matter is registered in the name of Paul Manguru Muigai as the sole proprietor and was so registered even at the time this suit commenced.

Parties elected to prosecute this application through written submissions. The 2nd defendant submitted that the Originating Summons commence in this court on 9th November 2009 .He stated that under Order XXXVI Rule 3D which the plaintiffs presented the application it required that the OS be supported by an affidavit to which a certified copy of the extract of the title they claim on be a annexed and that failure to annex the said document puts the court and the defendant at a disadvantaged position. On the second objection the 2nd defendant submitted that the subject matter in this suit Limuru/Kamirithu,T.227 is registered under the name of the 2nd defendant Paul Manguru Muigai as of 13th October 2009 and that on 10th November 2009 when this suit was presented the 2nd Defendant could not be sued as the administrator of the estate of Muigai Chege but as a proprietor. Therefore it was wrong for the plaintiff to sue the 2nd defendant as an administrator where the horse had fled from the estate.

The plaintiffs filed their written submissions on 27thMarch 2014 and responded that the OS and all subsequent pleadings revolved around the ownership of Land Reference No Limuru/Kamirithu /T.277.They further submitted that a preliminary objection ought to be raised on a point of law which it

would be taken would dispose of the suit on limine. They relied on the case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA** where the principles of a preliminary objections were stated as:-

- a. *A preliminary objection raises a point of law*
- b. *It 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.*
- c. *It cannot be raised if what is sought is the exercise of judicial discretion.*

The plaintiffs argued that the dispute between the parties herein is with regards the ownership of the suit premises and the issue as to whether the plaintiffs are entitled to the suit property on the grounds that the same was sold to them by the deceased Muigai Chege and by dint of adverse possession. They submitted that the plaintiff have been on the suit premises since 1959 when the land was purchased from the deceased therefore they rightly sued the 2nd defendant as the administrator of the estate of Muigai Chege. They relied on the Replying Affidavit of Teresiah Wanjiru Muigai one of the administrators of the estate sworn on 3rd March 2006 in SPM Succ No 134 of 1994 at paragraphs 5 and 6 where the deponent stated that they omitted the suit property for reasons that the same had been sold to the plaintiffs by the deceased ad submitted that it was evident that there are facts inn this matter which have to be ascertained which renders the preliminary objection incapable of succeeding.

I have considered the application as well as the written submissions by counsels for both parties.

On the preliminary objections raised by the 2nd defendant/respondent that the suit is, inter alia, defective and instituted against the wrong parties, I think the issue of whether the property in dispute was acquired adversely or the plaintiffs purchased the suit from the deceased are issues which the trial Court can only make a determination on the basis of evidence. A preliminary objection, as was held in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd 1969 e.a. 696**, “..... 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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

It was also held in the same Mukisa case (supra) that a preliminary objection consist of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued, may dispose of the suit. In my view, the objection that the suit is against the wrong party or the issue of who exactly is owner of the suit property between the plaintiffs and the administrators of the estate of Muigai Chege are matters for trial and are in dispute so they cannot be issues for disposal by a preliminary objection. Similarly, the issue as to whether the suit is properly instituted in the names of Paul Manguru Muigai is a matter best left for the trial Court.

I have looked at the affidavit sworn by Teresiah Wanjiru Muigai one of the administrators of the estate sworn on 3rd March 2006 in SPM Succ No 134 of 1994 at paragraph 5 stated that:-“ *Before he died Mr Muigai Chege only left us for sharing according to the already existing boundaries LR Limuru /Kamirithu/731 having disposed LR No Limuru/Kamirithu/T.277 to David Kinuthia Karangi*”. and at paragraph 6 “*That it is true we came to discover the existence of LR No. Limuru/Kamirithu /T.277 long after filing of this cause and only after a request by David Kinuthia Karangi to transfer the same to him as he had been using it without legal title for over 15 years*”.

This is clear enough that there are issues that need further interrogation at the hearing. In view of all the above, the preliminary objection has no merit and is accordingly dismissed.

It is so ordered.

Dated and delivered in Nairobi this 11th day of July 2014.

L. GACHERU

JUDGE

In the Presence of:-

Mr. Njunguna for the 2nd Defendant/Applicants

M/s Ngweno for the Plaintiffs and interested party/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE