



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 326 OF 2015

CAROLINE WAITHERA MUNGAI.....1ST PLAINTIFF

FAIZ SAID JAFFER.....2ND PLAINTIFF

SHEZAD JALALDIN FAZAL.....3RD PLAINTIFF

ABDULATIF ESSAJEE KADERBHAI.....4TH PLAINTIFF

VERSUS

DR. ERNEST MUINDE KIOKO & 5 OTHERS.....DEFENDANTS

RULING

1. The plaintiff filed a preliminary objection dated 10th April 2018 raising the following grounds:

(a) The Counter – Claim dated 11th July 2016 offends the provisions of Order 7 Rule 5 of the Civil Procedure Rules and section 9 of the Land Registration Act.

(b) The Counter – Claim is a non-starter.

(c) It is an abuse of the Court process and violates the doctrine of estoppel and section 34 of the Advocates Act.

2. The parties filed written submissions in support of and against the preliminary objection. The plaintiff argued that the counter – claim was not accompanied by an affidavit which is a mandatory requirement under Order 4 rule 1 (2). The plaintiff relied on the case laws of **Mukisa Biscuits Manufacturers Ltd vs West End Distributors Ltd (1969) E A 696** and **Oraro vs Mbaya (2005) I KLR 141**.

3. The 2nd defendant also filed a preliminary objection dated 4.6.2018 against the suit and the counter – claiming. The preliminary objection raises the following grounds:

1. The suit and the Counter – claim offends the provisions of order 7 of the Civil Procedure Rules and Section 9 of the Land Registration Act No. 3 of 2012.

2. The suit and the Counter – claim violates the doctrine of estoppel and the plaintiffs and the 3rd to 5th Defendants are estopped from prosecuting the 2nd Defendant.

3. The suit and the Counter – claim violate the doctrine of principal and agent relationship and provisions of section 34 of the Advocates Act.

The 2nd defendant on their part submitted that on the impact of lack of verifying affidavit. The 2nd defendant further submitted that it is not in any way engaged in the maintenance of all the conveyance documents relied on by the parties as that duty is bestowed upon the Land Registrar under the provisions of section 9 of the Land Registration Act. Lastly the 2nd defendant explained the meaning of estoppel as **“when one person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such other person or his representative to deny the truth of that thing.”** That the 3rd – 5th defendants having acted on the declaration of the 1st

defendant that both the plaintiff and 3rd – 5th defendants are now estopped from denying that the suit property was allocated/transferred to the plaintiff and from instituting a suit against the 2nd defendant on that basis. That the 2nd defendant being an advocate acted on behalf of the 1st defendant and on this basis the suit against him should be dismissed.

4. The plaintiff has cited the case of **Mukisa Biscuits vs West End Distributors** as well as **Oraro vs Mbaya** where the Court discussed and held in both instances that a preliminary objection 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 the process of evidence. That an assertion which claims to be a preliminary objection and yet 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. Further in the case of **D. T Dobie vs Muchina (1982) KLR I** the Court of Appeal held at paragraph 9 that:

*“The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is **so weak that it is beyond redemption and incurable by amendment**. As long as a suit can be injected with life by amendment, it should not be struck out.”*

5. On 8th October 2018, a verifying affidavit sworn by Samuel Mwangi on behalf of the 3rd defendant was filed. Mr Makuto State Counsel applied to have the same deemed as duly filed. There was no objection from the counsels appearing for the respective parties. Consequently the same was deemed as duly filed. The net effect of the verifying affidavit being admitted as part of the pleadings by the 3rd & 4th defendant makes the objection under Order 7 as overtaken by events. Also in light of the holding in the D. T Dobie case supra, the failure to file a verifying affidavit is an issue that can be resolved by way of amendment thus cannot form a basis for which this Court can strike out the counter – claim.

6. The objection on estoppel as raised by the 2nd defendant will require that facts and documents be presented to prove that indeed the plaintiff and the 3rd – 5th defendants acted on the declaration made by the 1st defendant that he was the registered owner. It means the preliminary objection has to be authenticated/proved by way of evidence. In the decision of Oraro vs Mbaya supra this objection automatically fails the threshold of a preliminary point of law. The same applies to the principal agent relationship raised. Lastly the objection raised in relation to section 9 of the Land Registration Act can only be raised by the 2nd defendant as a defence to the claim and not as a preliminary objection.

7. In conclusion, I find both preliminary objections dated 10.4.2018 and 4.6.2018 as lacking in merit. The same are dismissed with costs in the cause.

Dated, signed & delivered at Mombasa this 15th February 2019

A. OMOLLO

JUDGE