



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 232 OF 2017

DR. ANGEKA FREY.....PLAINTIFF

VERSUS

THE GENYA LUCY1ST DEFENDANT

THE LAND REGISTRAR KWALE.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. I have considered the submissions made by both the advocate for the 1st defendant and for the plaintiff. The 1st defendant had raised a preliminary objection to the effect that the person present in court as plaintiff is not the actual plaintiff. In the case of **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969) EA 696** it was held:

“A preliminary objection is in the nature of what used to be 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.”

2. In this case, the preliminary objection raised by counsel for the 1st defendant requires this court to exercise its discretion and refer the person named as plaintiff and who is before court to be subjected to scrutiny of either the German Embassy or the Ministry of Foreign Affairs or Interpol. The process entails the assessment of the factual materials that have been referred to in the submissions. In my view, such an exercise ought not to be undertaken by the court when determining a preliminary objection as it would entail looking into and assessment of factual material.

3. As to whether or not the person before court is the plaintiff or not is an issue to be determined from the assessment of the factual material. Such an undertaking is more approximately accomplished in the process of determining a substantive application or through the main hearing.

4. In effect, although I have come to the conclusion that the preliminary objection herein is not sustainable, that does not preclude the 1st defendant from re-visiting the issues already raised through an appropriate application or in the course of the hearing. The 1st defendant also has the liberty of ascertaining the correct factual position from other relevant agencies without necessarily an order from the court.

5. For now, the preliminary objection is overruled. As regards the notice to produce, it is my view that the same was filed and served late in the day. The 1st defendant should be afforded an opportunity to respond to the said notice to produce

DATED, SIGNED and DELIVERED at MOMBASA this 3rd day of April 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Maginya for plaintiff

Kimani for 1st defendant

No appearance for 2nd and 3rd defendants.

Yumna Court Assistant

C.K. YANO

JUDGE