



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 189 OF 2017

NATHAN KEGENGO MONAYO.....APPLICANT

VERSUS

PROF. JOHN SORANA AKAMARESPONDENT

RULING

1. The plaintiff filed the present suit vide a plaint dated 10th August 2017 filed in court on 28th September 2017. The plaintiff prayed for orders:-

1. That the Honourable Court orders rectification and cancellation and titles to land parcel Nyasibari/Chache/B/B/Boburia/1549 and all resultant numbers 8015, 8016, 8017 and 018 respectively.

2. Costs of the suit and relief the Honourable Court may deem fit and just to grant.

2. By the plaint, the plaintiff averred that he was the grandson of the late Monayo Nyaundi and was a beneficiary who was staying on land parcel **Nyaribari Chache/B/B/Boburia /1549**. The plaintiff further averred that the defendant acquired land parcel **Nyaribari Chache/B/B/Boburia/8016** being a subdivision from land parcel **Nyaribari Chache/B/B/Boburia/1549** fraudulently using dubious means and particularly without any succession proceedings being undertaken in regard to the estate of the late Monayo Nyaundi who was the registered owner.

3. The defendant by a statement of defence dated 17th July 2018 filed on 19th July 2018 inter alia pleaded that the plaintiff's suit was misconceived and untenable and gave notice to take a preliminary objection on the points of law enumerated under paragraph 10 of the defence (i) – (ix) as hereunder :-

(i) The instant suit does not lie.

(ii) The Honourable Court is devoid and/or divested of Jurisdiction to entertain and/or adjudicate upon the subject Dispute.

(iii) The subject dispute had (sic) hitherto been heard and finally disposed of Vide KISII ELC Case No.352 of 2014, alluded to by the Plaintiff herein. Consequently, the instant Suit is Res- Judicata.

(iv) The instant suit and the incidental proceedings are barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

(v) On the other hand, the instant suit is barred by the provisions of Section 34 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

(vi) On the other hand, the instant suit is barred by the provisions of Section 7 of the Limitations of Actions Act Chapter 22, Laws of Kenya.

(vii) In any event, the Plaintiff herein does not Disclose any reasonable cause of action against the Defendant or at all.

(viii) Besides, the instant suit amounts to and/or constitutes an abuse of the Due Process of Court.

(ix) In view of the foregoing, the plaintiff is Non-suited as against the Defendant jointly and/or severally.

4. On 29th April 2019 the Court directed that the preliminary objection be canvassed by way of written submissions. The defendant filed his submissions on 8th, May 2019 while the plaintiff filed his submissions in reply on 3rd July 2019. The defendant in support of the preliminary objection has contended that the plaintiff's suit is an abuse of the Court process as no nexus had been demonstrated as to how the plaintiff was a beneficiary of land parcel **Nyaribari Chache/B/B/Boberia/1549**. Further the defendant has contended no evidence had been furnished to establish that Monayo Nyaundi, through whom the plaintiff claims, was the registered proprietor of land parcel **Nyaribari Chache/B/B/Boberia /1549**.

5. Further the defendant has submitted that the plaintiff lacks the capacity to institute the present suit as he had not taken out any letters of administration to represent the estate of the deceased. The defendant further contended the present suit was **res judicata** by reason of Kisii ELC No.352 of 2014 where the Court had already made a decision and had issued a decree in respect of the land parcel **Nyaribari Chache/B/B/Boberia /8016** which is also the subject matter in the present suit.

6. The plaintiff in his response submissions stated that he had obtained grant of letters **ad litem** to enable him to file the instant suit on behalf of the estate of Monayo Nyaundi and maintained the present suit was properly before the Court and the Court had the jurisdiction to adjudicate the same. The plaintiff further contended the suit is not **res judicata** as claimed by the defendant. The plaintiff stated he was not a party in Kisii ELC No.352 of 2014 and that at any rate the said suit did not concern land parcel **Nyaribari Chache/B/B/Boberia/1549** which is the subject matter herein.

7. The plaintiff contended further the suit raises a reasonable cause of action as to whether or not the defendant acquired the suit property fraudulently. The plaintiff contends that the defendant got the suit property transferred to himself by a person who lacked the legal capacity to effect the transfer as no succession proceedings had been undertaken and hence no administrator of the deceased estate had been appointed.

8. The case of **Mukisa Biscuit Manufacturing Co. Limited –Vs- WestEnd Distributors Ltd (1969) En 696** is the leading authority in the determination of what amounts to and/or constitutes a valid preliminary objection. In the case it was held that a preliminary objection consisted of pure point of Law which is pleaded, or which arose by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit e.g an objection as to jurisdictions of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. Therefore, where a preliminary point of law is raised either on the basis of disputed facts which would require extrinsic evidence to be led by the parties at the trial, or even if allowed it cannot dispose of the whole suit then it cannot be disposed of as such.

9. Sir Charles Newbold, P, in the case of **Mukisa Biscuit Co. Ltd – Vs- WestEnd Distributors Ltd (supra)** put it succinctly:-

“A preliminary objection 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

10. The issue for determination in the present matter is thus whether the defendant's Preliminary Objection satisfied the threshold for a preliminary objection as established in the **Mukisa Biscuit case (Supra)**. The defendant has argued that the plaintiff lacked capacity to institute the present suit as he was not the personal legal representative of the deceased person's estate. The plaintiff as per the filed plaint averred he was instituting the suit on behalf of the estate of Nyaundi Monayo (deceased) who he claimed was the registered owner of land parcel **Nyaribari Chache/B/B/Boruria/1549** which was allegedly irregularly subdivided to create land parcels **8015** to **8018**. Whether or not the deceased was the registered owner of land parcel 1549 and whether the same was irregularly subdivided would in my view be a matter of evidence at the trial. As relates to capacity to file suit, the record shows the plaintiff was issued an **Ad litem** grant of letters of administration for the estate of Nyaundi Monayo (deceased) on 31st July 2017 “limited for the purpose of suing and prosecuting cases in Court” vide Kisii CM's Court Succession Cause No.321 of 2017. The present suit was filed on 28th September 2017 and clearly the plaintiff had by then the *locus standi* to institute the suit on behalf of the deceased estate.

11. The defendant further argued the present suit was **res judicata** on account of Kisii ELC No.352 of 2014 which the defendant stated dealt with and disposed the issue relating to land parcel **Nyaribari Chache/B/B/Boberia/8016** which was the subject matter in the present suit. The plaintiff was not a party in the said earlier suit and any decree issued in the said suit may not necessarily bind him. In the present suit, the issue relates to whether or not land parcel **Nyaribari Chache/B/B/Boberia /1549** was owned by the deceased, and if so, whether the subsequent subdivisions thereof were fraudulent and irregular and therefore required to be annulled. As I have observed earlier in this ruling the determination of such issue would invite evidence at the trial.

12. The provisions of Section 34 of the Civil Procedure Act Cap 21 of the Laws of Kenya which the defendant invoked to argue that the plaintiff is barred from instituting the present suit on account of the decree issued in the earlier suit, in my view is inapplicable in the present circumstances. The matters in issue in the present suit do not relate to the execution of the decree in Kisii ELC No.352 of 2014. The instant suit raises different issues from the issues raised in the earlier suit.

13. The end result is that I find the defendant's preliminary objection to be devoid of my merit. The preliminary objection is ordered dismissed with costs to the plaintiff.

RULING DATED AND SIGNED AT NAKURU THIS 29th DAY OF OCTOBER 2019.

J. M. MUTUNGI

JUDGE

RULING DELIVERED AT KISII THIS 7th DAY OF NOVEMBER 2019.

J M ONYANGO

JUDGE