



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 2 OF 2014

ISAIAH MBAABU (Suing through Athimba clan)1ST PETITIONER

PASQUALE MUKETHA (Suing through Akachiu clan)2ND PETITIONER

IBRAHIM KARANI (Suing through Nkula Clan)..... 3RD PETITIONER

VERSUS

LAND ADJ & SETTLEMENT OFFICER1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

MATE KABERIA BAIBIRI3RD RESPONDENT

KOBIA BAIMURI 3RD RESPONDENT

PAUL SOLOMON MIRITI4TH RESPONDENT

RULING

1. On 9.7.2017 the court gave directions that a ruling was to be delivered in respect of two pending Preliminary Objections, one dated 9.4.2014 and another of 3.6.2014. Submissions were to be filed in respect of the aforementioned Preliminary Objection's

2. On 11.10.2017, the court gave a short ruling informing the counsels for the parties of the court's predicament in writing the ruling in view of the fact that petitioner's submissions were in respect of the preliminary objection of 9.4.2014 and the appreciation of 12.3.2014 whereas 3rd, 4th and 5th respondents submissions were in respect of the preliminary objective of 9.4.2014 and the application dated 12.5.2014.

3. Despite notifying the counsels of this discrepancy no clarification was made and no request for further directions was made.

4. I will hence proceed to give a ruling as per directions given by myself on 19.7.2017

5. Firstly, I have not come across any application dated 12.5.2014. Perhaps the 3rd, 4th and 5th respondents were referring to the application dated 12.3.2014.

6. That notwithstanding I note that the court is not dealing with the pending applications going by my directions of 19.7.2017. I will hence disregard any submissions in respect of the pending applications.

Preliminary Objection of 3.6.2014

7. This preliminary objection was filed by the Attorney General but it was not prosecuted. No submissions were filed by any parties including the Attorney General. No other party gave a response in any way regarding this preliminary objection.

8. In the circumstances the preliminary objection dated 3.6.2014 is hereby dismissed with no orders as to costs.

Preliminary objection dated 9.4.2014

9. The preliminary objection was filed by the 3rd, 4th and 5th respondents. The grounds in support of the preliminary objection are that:

- (i) The application is incompetent, an abuse of the court process and untenable in law for want of procedure as pre-requisite leave was not sought, under the provisions of Section 5 (1) of the Judicature Act, order 52 Rule 2 (2) of Rules of Supreme Court of England.
- (ii) The service of the order was not affected as required by law and procedure as penal notice was not served as required together with Order.
- (iii) There are no legal entities like clans to hold land and thus cannot enforce an order.
- (iv) The petitioners have no capacity and locus to lodge and pursue the petition.
- (v) There are no property rights accrued which can be protected or enforced in form of the petition herein.
- (vi) Until the land is adjudicated and title deed issued, there is no tenable claim which can be founded by the petitioners.

10. What is a preliminary objection?

In **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd (1969) E.A 696**, it was stated that **“So far as I am aware, of a preliminary objection consist of a point of law which has been pleaded or which arises by clear implication out of pleading, and which if argued as a preliminary point may dispose off the suit**”

11. In the case of **Anoro versus Mbajja (2005) eKLR, JB Ojwang J (as he then was)** had this to say regarding a preliminary objection; **“I think the principle is abundantly clear. A preliminary objection correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the processes of evidence. Any assertions which claims to be preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principles, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point”**.

12. Grounds number 1 and 2 are a response to the application for contempt. The issues therein should be argued in that application.

13. As for grounds 3, 4 & 5 the issue boils down to whether a clan is a community or not this however is not a pure point of law as it invites arguments.

14. It is not for this court to make a determination at this point as to what a clan is, and whether the petitioners have locus. These are issues that can adequately be argued in the main petition.

15. I must point out that this is a classic example of how filing of unnecessary preliminary objections can bring confusion.

16. In Mukisa Biscuit case (Supra) it was stated that **“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs, on occasion, confuse issues. This improper practice should step”**. Decades down the line (from 1969), the preliminary objections are still filed in abundance.

17. The proceedings herein have become murky with the filing of numerous applications and the two preliminary objections to the extent that the issue of filing submissions and directions thereof has run the course of 3 and a half years. It is no wonder that when I took over this file, I was initially unable to write a ruling as submissions herein are also in disarray.

18. All in all, I find that the preliminary objection of 9.4.2014 is unmerited. The same is dismissed with costs to petitioners.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 7th MARCH, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Ondieki holding brief for Kaimenyi for 1st, 2nd and 3rd petitioners

Kiome for 3rd, 4th and 5th Respondents absent

Attorney General for 1st and 2nd respondent absent

Kirimo for 4th petitioner absent

HON. LUCY. N. MBUGUA

ELC JUDGE