



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 183 OF 2016

LUCY WACUKA MWANGI.....1ST PLAINTIFF

ESTHER WAITHERA CHEGE.....2ND PLAINTIFF

DAVID NDUNGU CHEGE.....3RD PLAINTIFF

PETER KAHIGA.....4TH PLAINTIFF

VERSUS

DANIEL MASIKA SADAKA.....DEFENDANT

RULING

1. In the Notice of Preliminary Objection dated **14/5/2018** the defendants avers that:

(a) Plaintiffs herein have no legal capacity to institute this suit.

(b) The estate in respect of the plots the subject matter of this suit belongs to the late ELPHANTAS MWANGI KIMANI.

(c) The plaintiffs have never taken Letters of Administration of the estate of the late ELPHANTAS MWANGI KIMANI hence they are strangers to the said estate.

2. The defendant filed his submissions on the Preliminary Objection on **12/6/2018** and the plaintiffs on **24/7/2018**.

3. The background to the preliminary objection is that the plaintiffs instituted this suit on the **20th December 2016** seeking an order of the rescission of the sale agreement entered into by the deceased on the **5th March 2016** and **11th May 2016**, an order that the defendant give vacant possession of the land to the plaintiffs, mesne profits and costs of the suit. In the body of the plaint they pleaded that they were the beneficial owners of **Plot Numbers 54, 55, 56** and **57** situate in Tuwan Farm when the defendant represented to them that he was able and willing to buy the said plots. It was then agreed that the defendant would buy them for an aggregate sum of Kshs. 1,600,000/= whereupon he paid Kshs. 100,000/= as deposit and took possession. On 11/5/2016 the defendant paid a further Kshs. 750,000/= towards the purchase price. It was then agreed that the balance being Kshs. 750,000/= would be paid before the end of June 2016. The plaintiffs state in the particulars of fraudulent misrepresentation that the defendant stated that he was ready and able to pay the balance while he was not ready to do so and seek the prayers above.

4. On his part the defendant filed a defence on the **7th February 2017** in which he stated that he admits the plaintiffs have beneficial interest in **Plots Nos. 54, 55, and 56** but **Plot 57** is John Mwai Waweru's. He also claims to have leased and subsequently developed the suit land before the purchase agreements were entered into. He further avers that the other plaintiffs had transferred the plots from their late father's name into the **1st** plaintiff's name before they were sold to the defendant, and therefore the **1st** plaintiff had been given consent to sell the family land. The defendant further pleads that there was another agreement dated 6/7/2016 relating to the accumulated payments, and that on that date a further payment of Kshs. 100,000/= was made and a further concession was also made that the balance, now Kshs. 650,000/= was to be paid in mid-august 2016. However before that date the defendant called the plaintiff to come for the whole balance of Kshs. 650,000/= on 2/8/2016 whereupon the **1st** plaintiff alleged that the defendant had already breached the terms of the agreement. In the midst of so much material presented before the court, the question arises: Is this a proper preliminary objection? I will examine the parties' submissions herein below.

The Defendant's Submissions

5. The issue that arises in this preliminary objection is whether the plaintiffs have capacity to institute the suit. The defendant avers that the

share certificates to land subject matter herein indicate that the land is the property of **Elphantas Kimani Mwangi** (deceased) and the plaintiffs have not taken out letters of administration to the deceased's estate.

6. He avers that **Section 45** of the **Succession Act Cap, 160** provides that no dealings should be transacted in respect of a deceased's property until after succession proceedings. He avers that the plaintiffs gave an indication that there were no surviving members of the estate of the late Elphantas Kimani Mwangi and so induced the defendant to purchase the plots. He commenced citation proceedings against the 1st plaintiff to compel her to take up succession over the deceased's estate but she failed and refused and the court gave the defendant leave to petition for letters to the said estate. Subsequently the deceased's sons who had been misled into believing that their father's estate had been encroached on by the defendant gave the defendant permission to take out letters of administration.

The Plaintiffs' Submissions

7. The plaintiffs' submission is that this is a case of breach of contract and it is not disputed that there was an agreement between the plaintiffs and the defendant and that the defendant is still in possession yet he has failed to perform his part of the contract. Therefore the plaintiffs aver that letters of administration are not necessary for a party to litigate in respect of a contract that he is a party to and that one acquires locus standi simply by being a party to the agreement.

Determination

8. The court in the case of *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd, (1969) EA 696*, defined a preliminary objection as being in the nature of what used to be a demurrer; that it raises a pure point of Law which is argued on the assumption that all 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. In the words of *Sir Charles Newbold* in that judgment,

“A preliminary objection is in the nature of what used to be a demurrer. It raised 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 occasions, confuse the issue. The improper practice should stop.”

9. I have considered the plaint and the defence herein. It is true that there are succession proceedings which are running parallel to the instant suit. This court has not had the chance to hear evidence regarding those proceedings. The documents regarding those proceedings may, going by the pleadings herein, be part of the evidence when this suit is being heard.

10. However, what is not denied is that there was an agreement between the plaintiffs and the defendant and the plaintiffs contend that by virtue of their having been parties to the agreements, they are entitled to commence this suit without any letters of administration to any person's estate.

11. The issue herein goes beyond a clear cut preliminary objection since the court would have to call for and examine the documentary evidence in the succession proceedings as well as examine other documents including the share certificates of the said deceased, link them to the suit land or conclude whether they relate to the suit land in giving a determination on this preliminary objection. It is worthy of note that no clear pleading that would have enabled the plaintiffs to respond appropriately on the issue has been laid out expressly by the defendant in the defence concerning the allegation that the deceased owned the land. He has only alluded to the succession proceedings without outlining how they truly affect this case.

12. In the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd* (Supra) the court stated as follows:-

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which, if argued as a preliminary point may dispose of the suit”.

13. For the reasons stated in **paragraph 11** herein above, I can not state in this case that the preliminary objection has been clearly pleaded, or that it arises by clear implication out of the pleadings. The purported preliminary objection has failed the test in the **Mukisa** case (supra.)

14. Consequently I find that the preliminary objection has no merit and I hereby dismiss it with costs to the plaintiff's and order that the main suit be set down for hearing.

Dated, signed and delivered at Kitale on this 26th day of September, 2018.

MWANGI NJOROGE

JUDGE

26/9/2018

Coram: Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ambutsi for respondents

N/A for applicants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

26/9/2018