



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.309 OF 2012

KENYA AFRICAN NATIONAL TRADERS &

FARMERSUNION (*Suing through its office bearers*)

KIMANI WANYOIKE - (*Chairman*)

PETER MUGEKA MAINA - (*Secretary General*)

IBRAHIM WANENE - (*Treasurer*)PLAINTIFF

VERSUS

MUNEE TUMBO LAVU (*Sued as the personal and/or.....*)1ST DEFENDANT

MATHEMBO TUMBO LAVU (*legal representative of*)

TUMBO LAVU.....2ND DEFENDANT

LUKENYA RANCHING AND FARMING

CO-OPERATIVE SOCIETY LIMITED.....3RD DEFENDANT

PETER LAVU TUMBO..... OBJECTOR

RULING

1. In the Notice of Preliminary Objection dated 20th November, 2013, the Objector has averred that the Originating Summons filed by the Plaintiff is incompetent and an abuse of the process of court; that Tumbo Lavu, the registered proprietor of parcel of land known as Mavoko Town Block 3/1992 died on 3rd August, 1979 before the purported sale of the land and that the suit offends the provision of Section 45 of the Law of Succession Act.
2. According to the Objector's Preliminary Objection, one of the Defendants, Mathembo Tumbo Lavu, died long before the suit was filed and that the entire suit is incompetent and unmaintainable.
3. The Notice of Preliminary Objection proceeded by way of written submissions. The Objector's counsel submitted that it is universally agreed that the issue of jurisdiction goes to the root of the matter; that the suit land is registered in the name of Tumbo Lavu; that the Objector is a close relative of the 1st and 2nd Defendants and that Tumbo Lavu died in 1979 while the 1st and 2nd Defendants died in the 2014 and 1996 respectively.
4. Counsel submitted that the purported sale of the suit land and the Originating Summons offends the provision of Section 45 of the Law of Succession Act.
5. The Plaintiff's advocate submitted that there is no provision in law allowing a person to walk into a suit and participate in proceedings unless they are named as parties; that there is no party to the Amended Originating Summons known as Peter Lavu Tumbo and that the Notice of Preliminary Objection should be dismissed on that ground alone.
6. The Plaintiff's counsel submitted that in any event, the Preliminary Objection is unsustainable in law because it does not fall within the purview and principles governing a Preliminary Objection.

7. In the Amended Originating Summons dated 28th July, 2012, the Defendants, Munee Tumbo Lavu and Mathembo Tumbo Lavu, have being sued as the personal legal representatives of the late Tumbo Lavu. The Originating Summons is principally seeking for a declaration that the Plaintiff has acquired the land previously known as Plot No. 531 (*now known as Mavoko Town Block 3/1992*) by way of adverse possession.

8. The Objector, Peter Lavu Tumbo, entered appearance as “*one of the beneficiaries of the late Tumbo Lavu.*” After entering appearance, the Objector filed the current Notice of Preliminary Objection.

9. The Objector has not denied that he is not one of the Defendants. Indeed, according to the Notice of Preliminary Objection, the 1st and 2nd Defendants died before the suit was filed.

10. It is trite that a Plaintiff always has the right to choose the parties he wishes to sue in a civil claim. However, the Civil Procedure Rule, at Order 1 Rule 10(2) allows the joinder of a Plaintiff or Defendant, or any person who ought to have been joined, to be joined to enable the court to effectively and completely adjudicate upon and settle all questions involved in a suit. Such joinder can only be either on application by a party or by the court on its own motion.

11. The Objector/Applicant did not apply to be allowed to join the suit, either on his own behalf or on behalf of the Defendants. Consequently, he cannot purport to participate in these proceedings without the leave of the court, or before the court can join him in the suit *suo moto*. Consequently, and on that ground alone, I find that the Notice of Preliminary Objection dated 12th October, 2012 was filed by a person who is a stranger to the proceedings and is incompetent.

12. Even if the Objector had been joined in these proceedings, the issues raised in the Notice of Preliminary Objection can only be ventilated vide a formal application. As was held in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Limited (1969) E.A 696*, a Preliminary Objection, being a demur, should raise 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 is to be ascertained or if what is sought is the exercise of judicial discretion.

13. Considering that the issue of whether indeed the 1st and 2nd Defendants died before this suit was filed is a factual issue, which can only be determined either on Affidavit or documentary evidence produced during trial, the issue cannot pass as a pure point of law.

14. For those reasons, the Notice of Preliminary Objection dated 26th November, 2013 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE