



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 7 OF 2013.

FREDRICK IDIAMA EMOJONG.....PLAINTIFF

VERSUS

SEFERIO MANGENI MANYURU

DINA ACHIENG NYONGESA

LYDIA BENTAH TATAH MANGENI..... DEFENDANTS.

R U L I N G.

1. What is before me is a preliminary objection premised on two propositions viz:

i. The suit is bad in law in SITU

ii. The applicant/plaintiff claim to the suit land is incapable of being granted and contrary to the express provisions of statutory law – being the Land Control Act.

The notice of the preliminary objection was filed here on 18/1/2016. It is clear the defendants want the plaintiff's suit dismissed.

2. On 19/1/2016, it was agreed that the preliminary objection be canvassed by way of written submissions. Subsequently, the defendants submissions were filed on 25/1/2016. The plaintiff's submissions were filed a year later, that is on 19/12/2016.

3. In the suit, the plaintiff – **FREDRICK IDIAMA EMOJONG** - complains that the defendants - **SEFERIO MANGENI MANYURU, DINA ACHIENG NYONGESA** and **LYDIA BENTA TATAH MANGENI** – have fraudulently and/or illegally acquired his land parcel NO.L.R SOUTH TSO/ANGOROMO/7331 and subdivided it into parcel NO'S L.R. SOUTH TESO/ANGOROMO/8424, L.R. SOUTH TESO/ ANGOROM/8425, L.R. SOUTH TESO/ANGOROMO/8426 and SOUTH TESO/ANGOROMO/8427. He asks, inter alia, for reversal of the whole process and cancellation of the resultant titles. The defendants have not filed a defence.

4. The thrust of the defendants objection is as follows. The issue of who is the registered proprietor of the suit land was settled vide ruling in BUSIA H C P & A NO. 3 of 2000 and that the plaintiffs claim is based on purchase. That purchase was allegedly from 1st defendant. According to defendants, that should have been followed by procurement of the necessary consent from Land Control Board. And that was never done, the whole transaction therefore was vitiated and any money paid by the plaintiff became recoverable as a civil debt.

5. The plaintiff on the other had alleged that the objection is misplaced and incompetent since the defendants averments require tendering of evidence. It was said to fall short of the requirement for a proper preliminary objection as set out in the case of **MUKISA BISCUITS MANUFACTURING LTD VS WEST END DISTRIBUTORS LTD [1969] E.A 696**. According to the plaintiff a preliminary objection should be on a pure point of law, should not require production of evidence, should be able to dispose of the entire suit, and should not be mischievous or vexatious or meant simply to buy time.

6. I have considered the suit as filed and the rival submissions. As I pointed out earlier, the defendants have not filed a defence. If a preliminary objection is one meant to dispose of the entire suit in limine, it is first pleaded in the defence. And while pleading it, an intimation is given that the point pleaded would later be raised as preliminary objection. Failure to file a defence led to omission of this crucial step. And it is a crucial step because the defence affords the court the opportunity to know which facts are being controverted or admitted.

7. It should be appreciated that a preliminary objection can only be raised where facts are uncontested and/or admitted (see MUKISA BISCUIT'S case supra). It cannot be raised where facts have to be ascertained or where what is sought involves the exercise of judicial discretion (*see also MUIRURI VS KIMEMIA [2002] 2 KLR 677, NJOYA & 6 others VS ATTORNEY GENERAL & Another [2004] 1 KLR 232, GITAU VS THUO & 2 others [2009] KLR 86, and REPUBLIC VS PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & ANOTHER Exparte SLEX SIS TEMI Integrati [2008] KLR 728*).

8. As regards the requirement to plead the objection in the defence, the decided case of **ACHOLA & ANOTHER VS HONGO & ANOTHER [2004] KLR 462**, is illustrative. In the case the appellants filed a case against the respondents alleging, inter alia, the tort of fraudulent misrepresentation. The second respondent, the Municipal Council of Kisumu, which was second defendant in the High court, raised a preliminary objection that the suit against it was time-barred since the alleged tort was said to have been committed in 1994 and the original plaint was only filed in 1997. A defence previously filed by 2nd Respondent had neither pleaded the defence or limitation nor specifically pleaded that the claim was time-barred under the Public Authorities Limitation Act. The High court nevertheless allowed the issue of limitation, upheld the preliminary objection and thereby terminated the appellants claim. The appellant appealed.

9. The Court of Appeal held, inter alia, that the 2nd respondent having failed to plead Limitation in this defence, was not entitled to rely on that issue and base a preliminary objection on it.

10. As pointed out earlier, a defence opens the eyes of the court to see the contested, uncontested and/or admitted facts. When the preliminary objection is raised later, it is then easy to see what facts it is premised on and whether those facts are contested or not. The defendants were wrong in plunging headlong into the preliminary objection without first filing the defence.

11. But even if one were to overlook this, it seems clear to me that the truth of the propositions made to support the objection is not axiomatic. One assertion is that the issue of ownership was settled vide ruling in BUSIA HC P&A NO. 3 of 2000. In that ruling, the 1st defendant was the objector and the plaintiff herein was the interested party. This is what the learned judge (F.TUIYOTT, J) said about the transaction that led to alleged ownership:

“ The court restrains itself from examining the sale transaction entered into between the objector and the interested party...”

Simply put, the court declined to delve into the issue of ownership. And it did so because that was the preserve of Environment and Land court. It is not a settled fact therefore that that ruling addressed ownership. It seems to me that it was addressing the issue of exclusion of the objector from a grant issued earlier.

12. The other assertion is that provisions of Land Control Act were not complied with. This is

particularly so regarding consent. One thing is clear: The plaintiff pleads he has title to the suit land. A copy of that title is even in court records. When one shows such title, there is a rebuttable presumption that it was obtained legally. Anybody alleging that some crucial legal steps were omitted must avail evidence to prove it. When you raise the issue as a preliminary objection, you are excluding such evidence from court. In the specific circumstances of this case the defendants wants the court to accept as gospel truth their allegation that the plaintiff obtained the title without the necessary Land Control Board consent. It is not that easy. The defendants need to allege and prove. The plaintiff is generally right in arguing that what is alleged require production of evidence.

13. The position is therefore clear that whether one is looking at the objection from a legal perspective or from the factual premise on which it is based, one is bound to come to the conclusion that it cannot pass muster.

14. It is for these reasons that the objection is hereby rejected and dismissed with costs.

A. K. KANIARU,

JUDGE.

DATED AND DELIVERED ON 25TH DAY OF JANUARY, 2017.

IN THE PRESENCE OF ;

PLAINTIFF.....

1ST DEFENDANT.....

2ND DEFENDANT.....

3RD DEFENDANT.....

J U D G E.