



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 39 OF 2012

GRACE KHISA MALENYA.....PLAINTIFF

VERSUS

JANE KILIMO.....DEFENDANT

RULING

1. The plaintiff filed a Notice of Preliminary Objection to the Defence and Counterclaim dated 27/9/2016. In the said notice she stated her grounds to be as follows:-

(1) That the defendant herein has no *locus standi* to file this suit as the purported Letters of Administration cannot legally confer any rights to her to institute this suit.

(2) That the purported agreement between the late Emmanuel Kilimo Kumngole and one Bosco Wamachichi Bono executed in 1979 became null and void *abi initio* after six (6) months for want of Land Control Board consent and as such that agreement cannot be relied on to claim the land.

(3) That the defendant is time-barred from relying on the decree in *Kitale PMCC No. 294 of 1989* after expiration of a period of 12 years as no execution has ever been levied using that decree.

(4) That the plaintiff herein is the legal proprietor of the Title Number Trans-Nzoia/Mito Mbili Settlement Scheme/96, having legally obtained title.

(5) That the plaintiff prays that the defence and the counterclaim filed herein be struck out with costs.

2. On 6/2/2017 this matter came up in court and both parties consented to the preliminary objection being disposed of by way of written submissions. The plaintiff filed submissions on the 20th February, 2017. The defendant did not file any submissions.

3. This suit was commenced by way of a plaint filed on 19/3/2012. The plaintiff after setting out the descriptive parts, avers as follows; She is the registered owner of **Title Number Trans-Nzoia Mitoni Mbili SFT/96** (sic) (herein after referred to as “the suitland”; On diverse occasions in the year 2011 the defendant unlawfully entered the suitland and cultivated a portion thereon a portion measuring 2 acres or thereabout; That in February, 2012 the defendant did the same; That the plaintiff issued notice to the defendant to desist from the said acts but she ignored it; That the plaintiff has been denied user and enjoyment of her parcel of land, and that the plaintiff prays for an eviction order and a permanent injunction restraining the defendant from trespassing onto, utilizing, entering onto or in any other manner

interfering with the suitland.

4. The defendant filed a defence on 8/5/2012 which she later amended to include further particulars and a counterclaim. In the amended defence and counterclaim the defendant averred that; She is the legal administratrix of the estate of the late **Emmanuel Kimngole**; She has been issued with a Limited Grant of Letters of Administration ad litem in respect of the said estate; That the plaintiff is not the registered owner of the suitland; That the defendant did not unlawfully enter and cultivate the plaintiff's land in the year 2011 and 2012; That her father purchased the suitland from **Bosco Wamachichi Bono** (now deceased) and continued to pay the loan outstanding on the suitland to the Settlement Fund Trustee until payment in full; That a dispute arose between her father and the plaintiff in the **year 1988** which was referred to the Land Dispute Tribunal which awarded **7 acres** to her father and the said decision awarded the plaintiff **three acres**; That the said decision was adopted and a decree issued vide **Kitale PMCC No. 294 of 1989**; That the plaintiff obtained a Grant of Letters of Administration to her late husband's estate and Confirmation thereof on 7/4/2011 without disclosure of the interest of the defendant's father; And that the registration of the plaintiff as the absolute owner of the suitland is illegal, fraudulent, null and void *ab initio*.

5. In addition the defendant pleaded that the suit is *res judicata*, frivolous, vexatious, and an abuse of the court process, is time barred, and does not disclose any cause of action.

6. The defence is filed together with a counterclaim which reiterates all the contents of the defence. The defendant, in her counterclaim, seeks a declaration that 7 acres or 3.15 Ha out of the suitland is the property of her late father, and a permanent injunction restraining the plaintiff from carrying out any development on the said parcel of land.

7. The matter in this suit took a dramatic turn on 17/6/2016 when an affidavit sworn on 16/6/2015 was filed by the defendant. The said affidavit was sworn by one **Bosco Wamachichi alias Wamatsitsi**, who stated as follows; That he was the registered proprietor of **Plot No. 96 Mito Mbili 580 Settlement Scheme** (sic); That he sold all the parcel of land to **Mr. Emmanuel Kilimo**; That he is aware that the defendant herein is daughter to the purchaser of the land; That the plaintiff herein is his cousin and not his wife, and that having sold the land, he does not have any further claim thereto.

8. Annexed to the said affidavit is a copy of an agreement and a copy of an affidavit in support of the contents of the agreement.

9. From the record, when the matter came up in court on the 26/7/2016, Ms. Munialo for the plaintiff sought to cross examine the deponent of the said affidavit, a bid that was rejected by this court which indicated that the deponent was intended to be called as a defence witness.

10. On the same day, when the plaintiff arrived, she was asked to confirm if the deponent of that affidavit was the person in respect of whom she had obtained a Grant and Confirmation of Letters of Administration. She positively identified him as such and further alleged that she had lived with the deponent as husband and wife though he had not formally married her.

11. Pursuant to these revelations Ms. Munialo, upon obtaining further instructions from her client the plaintiff, withdrew the suit on her behalf on 17/8/2016 thus bringing the plaintiff's claims to an end. Only the counterclaim filed by the defendant now remains. This is the counterclaim that has led to the filing of the notice of preliminary objection dated 27/9/2016, whose grounds are set out at the beginning of this ruling. In her submissions, Ms. Munialo abandoned other grounds and urged grounds Number 2 and 3 only.

12. In her own language she stated as follows:-

“I urge you to dismiss the counter-claim on the two legal points I have submitted on; I do not wish to belabor on the other grounds”.

13. In her submissions Ms. Munialo urges that the decree in *Kitale PMCC Land Case No. 294 of 1979* cannot be relied on by the counter claimant. She stated that after 12 years from the date of the decree if no action has ever been taken to execute the decree then the decree cannot have the force of law. She cited the *Limitation of Actions Act Cap 22 Section 4 (4)*. That Section states as follows:-

“An action may not be brought upon a judgement after the end of twelve years from the date on which the judgement was delivered, or (where the judgement or a subsequent order directs any payment of money (or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question and no arrears of interest in respect of a judgement debt may be recovered after the expiration of six years from the date on which interest became due”.

14. The rule on what amounts to a preliminary objection was addressed in the case of *Mukhisa Biscuits Manufacturers Ltd -vs- West End Distributors Ltd [1969] EA 696* where the Court of Appeal said:-

“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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

15. For the preliminary objection to succeed the plaintiff who is the defendant to the counterclaim now must show that she is raising a pure point of law and that there is no dispute regarding the pleaded set of facts surrounding the enforcement of the decree in *Kitale PMCC Land Case No. 294 of 1979*. Are all the facts on the execution of that judgement as seen from the pleadings, undisputed?

16. To answer this question it is necessary to peruse the pleadings and other documents. The plaint makes no mention of the said decree. The amended defence and counterclaim raised it first at paragraph 8 which states:-

“The defendant wishes to aver that a dispute arose between the late Emmanuel Kilimo Kimngole and the plaintiff in the year 1988 relating to the suit property and the said dispute was referred to the Land Dispute Tribunal which awarded 7 acres to the late Emmanuel Kilimo Kimngole whereas the plaintiff was awarded 3 acres and the said decision was adopted and a decree issue vide *Kitale PMCC No. 294 of 1989*. The plaintiff is therefore invited to strict proof to the contrary”.

17. Nowhere else in the amended defence and counterclaim is the said decree mentioned. The prayers in the counterclaim are not specifically tailored to enforce the decree in *Kitale PMCC Land Case No. 294 of 1989*. The said pleading sets out allegations of illegality and fraud on the part of the plaintiff's action on which the counterclaim is based.

18. In so far as the pleadings are concerned, the plaintiff appears not to have raised any specific issue with the decree. The only reply to paragraph 8 of the amended defence and counterclaim is paragraph 6 of the reply to amended defence and counterclaim. It briefly states as follows:-

“6. Paragraph 8 of the defence is denied in toto and even if such a dispute arose the plaintiff is/was not aware of the same”.

19. The plaintiff here is understood to be issuing a general denial of the contents of paragraph 8 of the amended defence and counterclaim. She intimates that she was not even aware of the particulars of the dispute between her and Emmanuel Kilimo Kimngole, now deceased which led to the institution of the Land Disputes Tribunal Proceedings and subsequently *Kitale PMCC No. 294 of 1989*.

20. The plaintiff, having failed to plead with specificity on this issue, may not be heard to rely on the alleged illegality of the execution of a decree in *Kitale PMCC Land Case No. 294 of 1989*. It is pleadings which bring the parties to an issue or issues. This issue cannot be said to arise from the pleadings.

21. An issue may also not be raised as a preliminary issue if any fact has to be ascertained. Though the plaintiff pleads in the plaint that the defendant unlawfully entered her plot in the year 2011 and the year 2012, it is not clear from the amended defence and counterclaim as to when the defendant entered the land. The amended defence and counterclaim states at paragraph 5:-

“The defendant denies in toto the contents of paragraphs 4 and 5 of the plaint. The defendant particularly denies unlawfully entering and cultivating the plaintiff’s alleged plot Title Number Mitoni Mbili S.F.T/96 in the hear (sic) 2011 and 2012 as alleged. The plaintiff is therefore invited to strict proof”.

22. This statement is made in answer to paragraphs 4 and 5 which alleged that the defendant unlawfully entered and cultivated the plaintiff’s land in the years 2011 and 2012. There is therefore no clarity as to when the defendants entry, whether authorized or unauthorized, whether in express execution of the decree or merely out of any other need, into the suitland occurred. For reasons that will become clearer in this ruling it is necessary not to address this issue any further at the present juncture. There is insufficient material on the face of the pleadings on the basis of which this court may uphold limb number 3 of the preliminary objection dated 27/9/2016. Besides, if the execution of the decree is successfully put into issue as a preliminary point, the vexing question that may arise is whether revocation of the grant obtained by the plaintiff pursuant to the discovery that Bosco Bono, once presumed dead, is still alive and this court is aware that he is, the plaintiff had locus standi to raise it. As things stand now, and the court, in the interests of justice may not shut its eyes to the court record of 26th July, 2016, the withdrawal of the plaintiffs case against the counter claimant was prompted by considerations of whether she had locus standi or not.

23. The second point urged on behalf of the original plaintiff is that the consent of the land control board in respect of the sale of the suit property, the same being agricultural land, was obtained outside the 6 month period. This issue was first raised in paragraph 4 of the reply to amend defence and counterclaim. Again, the plaintiff appears to lack specificity in her assertions in that paragraph which reads as follows:-

“The plaintiff states that if indeed there is such an agreement for sale, and which is denied, then the same is null and void for want of land control board consent and the defendant is put to strict proof”.

24. This is not the kind of averment that may aid the preliminary objection at hand. First, the plaintiff is not sure whether there was any agreement, at least according to the language of that statement. Secondly it would have been necessary for the plaintiff to first specifically acknowledge the sale agreement in order to have a proper background from which to launch a countdown of the six months period beyond which the agreement would become null and void. It matters not that between 1979 and today there is obviously a gap of more than six months, indeed years. There are matters in pleadings that, when not specifically pleaded, need not be presumed by the court, hence the need for proper pleading in every case. When a court is left in the dark and thereafter a preliminary objection is lodged, the court is constrained to reject such an objection if the material omitted is crucial for its determination.

25. For the reasons stated therefore, this court finds the preliminary objection raised by the original plaintiff in this matter against the counterclaim to be without merit and the same is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Kitale on this 6th day of March 2017.

MWANGI NJOROGE

JUDGE

In the presence of:

Court Assistant - Isabellah

Ms. Munialo for the Plaintiff

N/A for Respondent

Ruling read in open court.

MWANGI NJOROGE

JUDGE

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