



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC CASE NO. 266 OF 2016

LAWRENCE KIMANI G. MUTHEMBA.....PLAINTIFF/APPLICANT

=VERSUS=

LEE MACHARIA MAINA.....1ST DEFENDANT/RESPONDENT

RULING

1. The Defendant/Applicant filed a notice of motion dated **12th May 2016** in which he seeks to have the Plaintiff's suit struck out. The Defendant at the same time filed a Preliminary Objection dated the same day.
2. In the notice of Motion, the applicant contends that the name under which he is sued does not belong to him. That he has nothing to do with plot No. I 162 which the Plaintiff claims. That his interest is in Plot No. N 162 where he has built a semi-permanent house with the permission of his father who was given the said plot by his father-in-law.
3. In the Preliminary objection, the defendant raises the same grounds as in the application i.e. that the name under which he is sued is not his and that the plot being claimed by the Plaintiff is different from the one he is occupying.
4. The defendant contends that his correct name is **Lee Gachara Maina** and not **Lee Macharia Maina** under which he is sued. He contends that the Plaintiff is a known land grabber who should be declared as a vexatious litigant.
5. I have carefully considered the applicant's application as well as the objection to the Preliminary Objection by the Plaintiff. On 21st November 2016, Justice Gacheru directed that both the Preliminary Objection and the notice of motion dated 12th May 2016 were to be heard together.
6. The defendant was initially represented by a lawyer but he later filed a notice of intention to act in person. During the hearing of the Preliminary Objection and notice of motion, the defendant argued that the plot in issue was given to him by his father. That the plaintiff in this case is the third person to claim the land and that Embakasi Ranching Company Limited is behind the three claimants.
7. Mr. Harris for the Plaintiff argued that the Preliminary Objection should not be allowed as the issue in contention regards only the name which can be corrected by amendment to the plaint. He contended that the plaintiff was allocated plot No. I 162 and that the defendant has Plot No. N 162. In response to the Plaintiff's submissions, the defendant stated that the Plaintiff should not be allowed to amend because he

is going to introduce a dubious map.

8. The Plaintiff's counsel did not file any response to the defendant's application. It would appear they did not understand the directions given by the court on 21st November 2016 to the effect that both the preliminary Objection and the Notice of Motion were to be heard together. However be that as it may, I have to decide whether the Preliminary Objection should be sustained or whether the application by the defendant should be allowed.

9. A Preliminary Objection was defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd. -Vs- Westend Distributors [1969] EA 696** as follows:-

“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 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.”

10. In the instant case, the defendant contends that the name under which he is sued is not his correct name. This fact is conceded by the Plaintiff. This is not a pure point of law which can be raised as a preliminary point of law. The fact that plot No. I 162 has nothing to do with him is also not a point of law. The Plaintiff is contending that what the defendant is calling Plot N 162 is the same property which the plaintiff is claiming as plot I 162. This is a fact which needs to be ascertained and cannot therefore be raised as a preliminary point of law.

11. On the issue of the notice of motion, the defendant is seeking to have the suit struck out on the grounds that he has been sued under wrong names and that property No. I 162 does not belong to him. These are not grounds upon which the plaint can be struck out. A pleading can only be struck out if it is so hopeless that not even an amendment can breathe any life into it. This is a simple matter where the defendant's name can be corrected by amendment of the plaint to indicate the correct names. On the issue of the plot being described as I 162 and N 162, this is a matter which will come out during the full hearing of the case. I therefore find that this is not a suitable case where the Preliminary Objection can be upheld or the suit struck out. The upshot of this is that I do not find merit in both the Preliminary Point of Objection raised or the notice of motion. I proceed to dismiss both the Preliminary Objection and notice of motion dated 12th May 2016 with costs to the Plaintiff.

It is so ordered.

Dated, signed and delivered at **Nairobi** on this **29th** day of May 2017.

E.O .OBAGA

JUDGE

In the presence of defendant in person

Court assistant - Hilda