



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 70 OF 2016**

**FRANCIS KIPTANUI**

**MAKICHE.....PLAINTIFF/APPLICANT**

**VERSUS**

**SUSAN**

**KIPLAGAT.....DEFENDANT/RESPONDENT**

**RULING**

**Francis Kiptanui Makiche (*hereinafter referred to as the plaintiff*)** has come the court claiming that on or about 10.9.2012, the plaintiff purchased from the defendant a parcel of land measuring 1½ acres forming part of L.R. NO. Chepkorio Farm Plot No. 9/710 for which the consideration was fully paid. The plaintiff took immediate possession of the parcel of land and developed the same and has settled thereon to-date. That when the plaintiff purchased the parcel of land, there was an access road but the same was closed by the defendant and her children subsequently and the plaintiff now cannot access his portion of land. The plaintiff and defendant have been variously called and held joint meetings to try and resolve the issue of the closure of the road with the assistance of the local administration but no solution has been found.

That at the time when the defendant sold the aforementioned parcel of land to the plaintiff, she had not obtained Letters of Administration over the estate of the late Paul Ketinyo who is still the registered proprietor. The plaintiff is now, under the circumstances compelled to pass through neighbor's land to access his land and has been seriously inconvenienced. The plaintiff has been prevented from accessing, cultivating and/or ploughing, planning and making any other use of his land. The plaintiff's claim against the defendant, her servants, agents, children or any other persons whomsoever is for an order compelling the defendant to avail an access road to the plaintiff unconditionally. The plaintiff has given notices, made demands, held meetings with the defendant but to no avail and hence this suit. The cause of action arose within the jurisdiction of this Honorable court. The plaintiff has not filed any other suit before any other court prior to this suit over the same subject matter.

The plaintiff prays for judgment that the defendant, her servants, agents, children or any other persons whomsoever be compelled to avail an access road to the plaintiff unconditionally plus costs of the suit.

The defendant filed a statement of defence whose import is that the plaintiff has never taken possession and that the parcel of land has not been subdivided and therefore, access road cannot be provided. Moreover, that the suit land is in the name of the deceased and that succession has not been undertaken in accordance to the law of Succession Act and therefore, the defendant had no capacity to transact on the deceased's land.

The defendant intimated that he would raise a preliminary objection on grounds that the defendant did not

have the locus standi to enter into a sale of land agreement with the plaintiff or any 3<sup>rd</sup> party and that the defendant has not obtained Letters of Administration for her late husband Jacob Kiptoo Kiprono to enable her have the authority to deal with part of the Estate of the deceased. The plaintiff purchased portion for L. R. No. Chepkorio Farm No. 9/710 does not exist or is not known to the defendant. The plaintiff has not obtained consent to transfer from the relevant Land Control Board since 2012. The defendant claims that the plaintiff has not established a prima facie case to warrant the orders sought herein. That the defendant's known parcel of land is L.R. No. Chepkorio Farm Plot No. 9507 and not 9/710. The plaintiff's equitable remedy is a refund of the purchase price if sale of plot is proved as required.

The defendant has reviewed a preliminary objection on grounds:

- (a) *That the suit is bad in law, frivolous and incurably defective.*
- (b) *That the defendant did not have the locus standi to enter into a sale of land agreement with the plaintiff or any 3<sup>rd</sup> party.*
- (c) *That the defendant has not obtained Letters of Administration in respect of the estate of her late husband Jacob Kiptoo Kiprono to enable her have authority to deal with the property/Estate of the deceased.*
- (d) *That the plaintiff purchased a plot from that parcel known as L. R. No. Chepkorio Farm No. 9/70 which does not exist or is not known to the defendant.*
- (e) *That the defendant's known parcel of land is L.R. No. Chepkorio Farm Plot No. 9507 and not 9/710.*
- (f) *That the plaintiff has not obtained consent to transfer the alleged purchased plot from the relevant Land Control Board since 2012.*
- (g) *That the plaintiff has not established a prima facie case to warrant the orders sought herein.*
- (h) *That the plaintiff's equitable remedy is a refund of the purchase price if sale of the purported purchased plot is proved as required.*

Strangely, there is another statement of defence and replying affidavit filed by the firm of Nyaundi Tuiyot on behalf of the defendant. But that is an issue for another date.

Mr. Rioba Omboto for the defendant, submits on the preliminary objection that at the time the sale agreement was entered into, the defendant did not have the capacity to enter into the sale agreement. Strangely, the preliminary objection is supported by a replying affidavit and therefore raises issues of fact. Mr. Omboto cites *Gitanga Mwaniki & another Vs Annuncita Waithira Kibue (2013)*, where the court considered evidence on record and viva voce evidence to arrive at the decision that at the time of the sale agreement being signed, the defendant did not have sufficient legal capacity to enter into the said sale agreement for lack of confirmed grant in respect of the estate of the deceased. The replying affidavit by Susan Kiplagat undated but filed on 20.5.2016 has no legal basis as it is not clear which application the defendant was replying to. Even if it was a supporting affidavit, this court finds that a preliminary objection is based on a pure point of law and not on facts.

On whether the parcel No. 9/710 exists, this court finds that the same is an issue of fact and not law.

On the issue of the consent of the Land Control Board, whether obtained or not, this court finds that it is premature to raise the issue as a preliminary objection as evidence is required to sustain the argument that the consent of the Land Control Board was not obtained.

The decision in the locus classicus case of Mukhisa Biscuits was that on preliminary objection.

I have considered the submissions of Mr. Miyianda and do agree that the defendant has not established that the suit is frivolous or defective. A suit can only be declared frivolous or defective if a defendant establishes so by way of an application to strike out but not through a preliminary objection. Moreover, there is an issue of possession raised by the plaintiff which cannot be addressed through a preliminary objection.

**In MUKISA BISCUITS MANUFACTURING CO. LTD -V- WEST END DISTRIBUTORS LIMITED (1969) EA. 696 in which SIR CHARLES NEWBOLD P observed as follows:-**

***“ ..... The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”***

In a nutshell, this court finds that issues relating to locus standi, who is in possession of the land, whether the property was sold to the plaintiff in the required legal procedure and whether he has a right to access road cannot be resolved through a preliminary objection because the court ought to examine the facts either through affidavits or viva voce. The preliminary objection is otherwise misconceived and is dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 18<sup>th</sup> DAY OF OCTOBER, 2017.**

**A. OMBWAYO**

**JUDGE**