



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 217 OF 2016**

**GILBERT MUSEMBI.....PLAINTIFF**

**-VERSUS-**

**1. MUSA MUREITHI**

**2. JOSEPHINE NJOKI KARANJA a.k.a JOSPHINE NJOKI**

**3. DIRECTOR LAND ADJUDICATION & SETTLEMENT**

**4. ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

1. For determination is the objection dated 8<sup>th</sup> September 2016 filed together with his statement of defence. The preliminary objection raised the following issues:

**a) That the 1<sup>st</sup> defendant no longer has any interests in the suit property.**

**b) That at the point at which the 1<sup>st</sup> defendant caused the 3<sup>rd</sup> defendant to issue a letter of allotment in favour of the plaintiff, all his interests with regard to the suit property were extinguished.**

**c) That ownership and possession vests in the plaintiff.**

**d) That any claim against the 1<sup>st</sup> defendant with regards to the suit property is bad in law and must be struck out. On this we rely on the Elijah Sikona case (supra). In that case the Court dismissed the plaintiff's case against the defendants on the ground that it did not demonstrate a reasonable cause of action. In doing so the Court had this to say "...However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the Court process, the Court will not allow its process to be used as a forum for such ventures."**

2. The parties agreed to argue the objection by filing of written submissions. In the 1<sup>st</sup> defendant's written submissions filed on 23<sup>rd</sup> May 2017, the party submits that the suit does not disclose a reasonable cause of action against him. To fortify this, he cited the case of **Elija Sikona & George Pariken Narok (on behalf of trusted Society of Human Rights Alliance) vs Mara Conservancy & 5 others (2014)**

**eKLR** in defining a cause of action as “a factual situation the existence of which entitles one person to obtain a remedy against another person.” That in this case, the plaintiff seeks no remedy against the 1<sup>st</sup> defendant because the whole suit is suit based on uncontested facts.

3. The 1<sup>st</sup> defendant submits further that in the plaint paragraphs 6, 7 & 8 the plaintiff pleads he bought the suit property and was issued on instructions of the 1<sup>st</sup> defendant with an allotment letter on 11<sup>th</sup> February 2002. That the plaintiff makes an admission that ever since he has been in possession of the land and has been developing it. That the defendant does not deny these facts as can be gleaned from the pleadings. Therefore it can be concluded that the 1<sup>st</sup> defendant no longer has any interests in the suit property. Consequently any claim made against him is bad in law and should be struck out. The 1<sup>st</sup> defendant also relied on the decision of **I & M Bank vs Nancy Thumari & 3 Others (2015) eKLR**. He urged the Court to dismiss the plaintiff’s suit as against him.

4. The plaintiff vide his written submissions filed in Court on 24<sup>th</sup> May 2017 had this to say in opposition to the preliminary objection. That he has laid grounds in paragraphs 6A, 6B, 6C & 7 of the amended plaint which requires the 1<sup>st</sup> defendant to defend this claim. That the issue of ownership of the suit property can only be exhaustively deliberated in full hearing with active participation of the 1<sup>st</sup> defendant. That the Court should be guided by the decision in **DT Dobie Company (Kenya) Ltd vs Muchina (1982) KLR 1** before striking out a suit. The plaintiff urged the Court to disregard the case laws relied upon by the 1<sup>st</sup> defendant and proceed to dismiss the preliminary objection.

5. I have considered the submissions rendered together with the pleadings filed. In paragraph 6A of the plaint reads thus;

*“That it was a term of the agreement of sale that the 1<sup>st</sup> Defendant procures the discharge in favour of the plaintiff and makes sure he gets a good title.”*

The 1<sup>st</sup> defendant replied in paragraph 4 of the amended defence by stating thus;

*“In response to the contents of paragraph 6A of the amended plaint, the 1<sup>st</sup> defendant avers that there was no such term in the sale agreement that he was supposed to procure a discharge on behalf of the plaintiff and that having ensured the plaintiff was issued with a letter of allotment he had discharged his duty...”*

6. It is trite law as was stated in the case of **Mukisa Biscuits vs Westend Distributors (1969) E A 696 at page 701** that a preliminary objection must be a pure point of law which is argued on the assumptions that all the facts pleaded are correct. That the same cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Secondly, in the case of **D. T Dobie Company Ltd supra**, it was held that a Court should only exercise the power to strike out a suit sparingly and cautiously as it is done without the Court being fully informed of the merits. Lastly that it serves the interests of justice to allow a suit to proceed to full hearing even if it raises only one triable issue.

7. In this instant, the 1<sup>st</sup> defendant has not denied selling the suit land to the plaintiff. It is also not in dispute that the plaintiff is in possession. However it appears the plaintiff is yet to secure a title deed in his name. On this account, he raises an issue that it was a duty on the 1<sup>st</sup> defendant as per their contract. No sale agreement was filed alongside these pleadings. What is referred to as a sale agreement in the plaintiff’s list of document at No 2 and is dated 13<sup>th</sup> May 2012 is only an acknowledgement that there was a sale between them and the 1<sup>st</sup> defendant undertaking to show the plaintiff the plot.

8. Whether there were any terms of the sale that has been breached therefore requires to be proved by adducing of evidence since the plaintiff has alleged and the 1<sup>st</sup> defendant rebutted/denied. This is an issue which cannot be resolved by way of a preliminary objection. Further in prayer (bb) of the amended plaint, the plaintiff is asking the Court to determine that any subsequent sale by the 1<sup>st</sup> defendant to any

other party is null and void. The fact that the 1<sup>st</sup> defendant has not denied subsequently selling this property to any other party makes prayer (bb) a substantive prayer to be determined by a full trial. In light of the foregoing reasons I refuse to be convinced that this preliminary objection raises a pure point of law. If the 1<sup>st</sup> defendant is found to have been wrongly sued, he can always be compensated by an award of costs. The result is the preliminary objection is dismissed with costs in the cause

**Dated, signed & delivered at Mombasa this 3<sup>rd</sup> day of October 2017.**

**A. OMOLLO**

**JUDGE**