



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C 411 OF 2017

PETER IRUNGU MUGI - PLAINTIFF

VS

ISAAC KINYANJUI KAMAU - 1ST DEFENDANT

ESTHER MUKAMI KINYANJUI - 2ND DEFENDANT

RULING

1. By way of background the Plaintiff filed suit against the Defendants on 5/10/2011 seeking judgement against the Plaintiff jointly and severally for a number of orders notably;

a) A declaration that the removal of the prohibitory order lodged against land parcel LOC.2/MARIIRA/2466 now 2963 was irregular, fraudulent, illegal, and null and void.

b) A declaration that the 2nd defendant's title to land parcel LOC.2/MARIIRA/2963 formerly 2466 was fraudulently obtained and is thus null and void.

c) An order cancelling the 2nd Defendant's title to land parcel LOC.2/MARIIRA/2963 and restoring it in the name of the first Defendant.

d) An order restoring the prohibitory order over the register of land parcel LOC.2/MARIIRA/2963.

e) An order authorizing execution of the decree in Kigumo RMCC 107 of 2006 against the new number LOC.2/MARIIRA/2963.

2. In opposing the claims, the Defendants filed a statement of defence on 16/11/2011 which extensively put the Plaintiff to strict proof in regards to the aforesated claims.

3. The gist of the suit is on alleged wrongful removal of a prohibitory order in respect to LOC.2/MARIIRA/2963 intended to safeguard execution of a decree in favour of the Plaintiff against the Defendant in PMCC No. 107 /2006 in that suit.

4. In 2012 it would appear that a receiving order was granted on 20/6/12 in Petition No. 20/2012 against the estate of Isaac Kinyanjui Kamau where the Official Receiver was constituted as the Receiver of the estate of the 1st Defendant.

5. The parties agreed to file written submission and were directed to do so by the 10/10/2017 however it is on record that the Applicant did not comply with the directions and consequently did not file any

written submissions. The Respondent did file on 3/10/17.

6. It is trite law that Preliminary Objection should be based on pure points of law. In the case of **Mukisa Biscuits Manufacturing Limited vs West End Distributors Limited (1969) EA 696** which the definition of preliminary objection was stated follows;

“so far as I am aware, a preliminary objection consists of a point of law which has been pledged or which arisen by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. ...”

7. In the case of **Oraro vs. Mbaja (2005) I KLR 141 Ojwang J** expressed himself as follows:-

“.....a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

8. Applying the above definition of Preliminary Objection enunciated in the aforesaid case law, I find that this Court is of the considered view that the issues raised in the Preliminary Objection are such that they require the Court to call for inquiries into. There are arguments and counter arguments in respect to the issues which invariably the Court has to call for evidence in a trial to verify the same. Secondly there is the issue of receiving order in Petition of 20 of 2012 which is alleged to be filed in Court and therefore, should be stayed. This immediately calls the matter of exercise of judicial discretion by the Court. Section 144 of the Insolvency Act No 18 of 2015 reads as follows:

“There may be included in a receiving order an order staying any action or proceeding against the debtor or staying proceedings generally.”

To my mind the use of the word “may” calls for exercise of the Court’s discretion which then removes the Preliminary Objection from being a pure point of law. In any event I have not seen on record any orders staying the suit for reasons advanced by the applicant or at all.

9. In the end the application is devoid of merit and the Preliminary Objection fails. It is dismissed with costs to the Plaintiff/Respondent.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 7TH DAY OF DECEMBER, 2017.

J.G. KEMEI

JUDGE